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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED SEPTEMBER 10, 1894.

(15,680.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1894.

1 *Caption.*

THE UNITED STATES OF AMERICA, }
District of South Carolina, } *To wit:*

In the Circuit Court, Fourth Circuit. At Law.

At a circuit court of the United States for the fourth circuit in and for the district aforesaid, on the first Monday in April, 1894, before the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had:

EDWARD B. WESLEY, Plaintiff, }
vs.
J. E. TINDAL and J. R. BOYLES, Defendants. }

Be it remembered that heretofore, to wit, on the 13th day of February, A. D. 1893, the said Edward B. Wesley, by his attorneys, Messrs. Lyles & Muller, came into court and filed the following complaint; which complaint is in the words and tenor following:

2 *Complaint.*

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff, }
against
J. E. TINDALL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants. }

The plaintiff above named, complaining of the defendant- herein, alleges—

1. That the plaintiff is and at the times hereinafter mentioned was a citizen of the State of New York, and that the defendants are and at the times hereinafter mentioned were citizens of the State of South Carolina.

2. That on the 16th day of February, 1892, the plaintiff purchased from the commissioners of the sinking fund of the State of South Carolina the following-described premises, situate in the city of Columbia, county of Richland and State of South Carolina, to wit, all that lot, piece, or parcel of land situate in the city of Columbia, containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street,

and on the south & west by lands now or formerly of Jacob C. Lyons, said lot of land b-ing the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated the 3rd day of May, A. D. 1875, and recorded in Book K of Deed-, pp. 106 & 107; also all that certain parcel or lot of land situate, lying, and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the Agricultural Hall building and lot immediately in rear thereof, east by Richardson street, south by lot formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker, said lot being a rectangular parallelogram in shape and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-eight feet and from east to west two hundred and eight feet, the said lot also adjoining a part of the Agricultural Hall block, and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated Dec. 11th, 1875, and recorded in R. M. conveyance office for Richland county in Book K of Deeds, pp. 319 & 320, the above-described two lots of land being the same conveyed to the State of South Carolina by deed of J. B. Johnston dated April 9th, 1883, and recorded in R. M. conveyance office in Book P of Deeds, &c., p. 87, and said premises are worth and at the times hereinafter mentioned were worth at least sixteen thousand one hundred and sixty-five dollars, which said premises were the said day, by the direction and appointment of the plaintiff, conveyed by the said commissioners of the sinking fund to J.W. Alexander, to hold the same in trust for the use
3 of the plaintiff, his heirs and assigns forever, and to permit the plaintiff to have and possess the same and to enjoy the profits and in trust to convey the same to the plaintiff, his heirs and assigns, or such person as he might direct and appoint; that, upon the request of the plaintiff, the said J. W. Alexander, by deed dated the 11th day of February, 1893, conveyed the said premises in fee-simple to this plaintiff.

3. That, the plaintiff being so possessed thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff, and that the defendants are and ever since the said 20th day of February, 1892, have been in possession of said premises and have been and still are withholding the same from the plaintiff, although plaintiff had demanded from the defendants the possession thereof, to the damage of the plaintiff ten thousand dollars.

4. That the value of the use and occupation of said premises is at least twenty-five hundred dollars per annum.

Wherefore the plaintiff demands judgment against the defendants—

1. For the possession of said premises.

2. For ten thousand dollars, the plaintiff's damage by the withholding of the same.

3. For the value of the use and occupation of said premises since

the 20th day of February, 1892, at the rate of twenty-five hundred dollars per annum.

4. For the costs and disbursements of this action.

LYLES & MULLER,
Plaintiff's Attorneys.

Feb. 30th, 1893.

Filed 13 February, 1893.

4 *Summons.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDALL & J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

Summons for Relief. (Complaint Served.)

To J. E. Tindall and J. R. Boyles, defendants in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers, at their office, No. 18 Law Range, Columbia, S. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., the thirteenth day of February, anno Domini one thousand eight hundred and ninety-three, and in the 117th year of the sovereignty and Independence of the United States of America.

LYLES & MULLER,
Plaintiff's Attorneys.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed 13 Feb'y, 1893.

5 *Marshal's Return.*

EDWARD B. WESLEY
vs.
J. E. TINDAL and J. R. BOYLES.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

John A. Barre, being duly sworn, says that he served the summons and complaint in this action on the defendants by delivering

to them personally and leaving with them copies of the same at their residences on the 13th day of February, A. D. 1893, and that he knows the persons so served to be the ones mentioned and described in the summons as J. E. Tindal and J. R. Boyles, the defendants therein, and the deponent is not a party to the action.

JOHN A. BARRE.

Sworn to before me this 13th day of February, 1893.

ROBT W. SHAND,
[SEAL.] *Notary Public for S. C.*

6 *Answer of J. E. Tindal.*

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDALL & J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

The defendant J. E. Tindall, above named, answering the complaint herein, says:

For a first defense.

That this defendant denies each and every allegation in the said complaint contained.

For a second defense.

First. Further answering, this defendant, for a second defense, says that on the 20th day of February, A. D. 1892, designated in the said complaint, this defendant was and has since continued to be and now is the secretary of *the* state of the said State of South Carolina; that the premises described in the said complaint on the said day were and have since continued to be and now are the property *fund* in the possession of the said State and in actual public use.

Second. That the defendant has no right, title, interest, or estate to or in the said premises of any kind whatsoever, but that in pursuance of law the same is in the custody of this defendant as said secretary of state.

MELTON & MELTON,
Attorneys for Defendant J. E. Tindall.

Filed 7th March, 1893.

7 *Answer of J. R. Boyles.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDALL and J. B. BOYLES, Citizens of the State of South Carolina, Defendants.

The defendant J. B. Boyles, above named, answering the complaint herein, says:

For a first defense.

That this defendant denies each and every allegation in the said complaint contained.

For a second defense.

First. Further answering, this defendant, for a second defense, says that on the 20th day of February, A. D. 1892, designated in the said complaint, J. E. Tindall, codefendant herein, was and has since continued to be and now is the secretary of state of the said State of South Carolina.

Second. That the said premises are the property of the State of South Carolina, and on the said day and since have been and now are in the possession of the said State and in actual public use.

Third. That this defendant has no right, title, interest, or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindall as secretary of state this defendant has been and now is engaged, on behalf of the said State, in watching, guarding, and taking care of the said premises.

MELTON & MELTON,
Attorneys for the Defendant J. R. Boyles.

Filed 7th March, 1893.

8 *Suggestion of Attorney General.*

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY
vs.
J. E. TINDALL and J. R. BOYLES.

And now comes O. W. Buchanan, attorney general of the State of South Carolina, and suggests to the court and gives it to understand and be informed that the property in controversy in this ac-

tion is held, occupied, and possessed through its officer and agent charged in behalf of the State of South Carolina with the custody and control of the property by virtue of the statute in such case made and provided and who is custodian of the same for and in the name of the State of South Carolina, which said property is now used by the State of South Carolina for public uses.

Wherefore, without submitting the right of the State to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the complaint in said action be set aside and all the proceedings be stayed and dismissed and for such other orders as may be proper in the premises.

O. W. BUCHANAN,
Attorney General So. Ca.

Filed 3rd April, 1894.

9 *Order Dismissing Motion of Attorney General.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

EDWARD B. WESLEY }
vs. }
J. E. TINDAL and J. R. BOYLES. }

When the testimony for plaintiff and defendants had been finished the attorney general, who had filed an intervention on behalf of the State, moved to dismiss the proceedings for want of jurisdiction. The action being in fact an action against the State, the presiding judge ruled as follows:

The position of the attorney general seems to be this: The defendants are mere care-takers of the property in question, put there for that purpose by State authority, with no title, interest, or estate and disclaiming all title, interest, and estate. Under these circumstances the action cannot lie against them. It is in fact an action against the State, the real party in interest, and this court has no jurisdiction.

In this case the question at issue is the right to possession of the land in controversy. Plaintiff claims to hold under a deed of conveyance in fee from the vendee and grantee of the sinking-fund commission, conveying all the right, title, and interest of the State. He avers that he demanded possession from the defendants and his demand was refused, because they had possession under the authority of the State. In other words, plaintiffs allege that wrong had been done him by defendants in refusing him possession. Defendants justify their action by setting up State authority.

10 Under The United States *vs.* Lee, 106 U. S.; Stanley *vs.* Schwalby, 147 U. S., 519, the action will lie.

"The State can do no wrong." But the corrollary from this is

that when it is proved that one citizen has done a wrong to another that other cannot excuse his act by setting up State authority. The State can never do nor justify a wrong.

The position that the title of this property is in the State will not avail. That is the very question at issue between the plaintiff and these defendants. Under the code of procedure of South Carolina if the contention of the plaintiff is correct and he has the legal title he is presumed to be in possession (section 101), "but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title." Marshall, Ch. J., in U. S. *vs.* Peters, 5 Cranch., 115, quoted and approved in United States *vs.* Lee, *supra*.

The motion of the attorney general is dismissed.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 16th April, 1894.

11 *Trial of Cause.*

At a stated term of the circuit court begun and holden at Charleston, S. C., in the district aforesaid, on the 4th day of April, 1894, this case came up for trial before the following jury, which was selected, organized, and sworn, to wit: J. M. Prioleau, foreman; Phillip Riley, Israel Ottalengui, Warren D. Hamlin, Perry Halfacre, J. M. Elliott, Charles Trenholm, Jesse Truesdale, C. W. Caldwell, Cleland William, J. L. Courtney, and J. B. Larrisey. The pleadings were read to the court and jury, and the testimony, taken by consent of counsel, was also read. The following witness was sworn and examined on behalf of the plaintiff, to wit, W. H. Lyles.

The defendants made a motion for a nonsuit. After hearing arguments of counsel the court refused to grant a nonsuit. The following witnesses were sworn and examined on behalf of the defendants, to wit: J. E. Tindal, secretary of state; W. C. T. Bates, State treasurer; James G. Gibbes, and David H. Means. Arguments were made by Mr. Muller on behalf of plaintiff and by Mr. Buchanan, attorney general, and Mr. L. D. Melton on behalf of defendants and by Mr. Lyles and Mr. Muller in reply on behalf of plaintiff. The court then charged the jury as follows:

MR. FOREMAN AND GENTLEMEN OF THE JURY: I think that this is a plain business case that you can settle on business principles. There is no mystery about it. The plaintiff in this case claims a right of possession of a building in the city of Columbia known as the Agricultural hall. He says that his possession was resisted by two persons in charge of the building, who had the building, co-custodians, alleging that it was the property of the State. He says, I hold a title from the State by the right, title, and interest the
12 State has made, and therefor- I am entitled to possession. You are to determine whether his assertion is true, and he is

bound to prove by his assertion to you and it is incumbent upon him to show you that his title is perfect, that cannot be gainsaid, that when he says he holds a title from the State he holds a title without flaw or imperfection, and he is to establish that by his own testimony or testimony of his own witnesses without aid from any other quarter. In law books the whole burden of proof is on him. Now, he produced a deed here and we are to determine from this testimony whether or not he has the right and possession of this property by reason of the fact that he has been legally clothed in all right, title, and interest of the State. Our law in South Carolina with regard to public property is this: Under the law of the State it is the duty of the commissioners of the sinking fund to sell and convey, through and on behalf of the State, all such real and personal property, assets, and effects belonging to the State as is not in public use, actual public use, said sales to be made from time to time in such manner and on such terms as they may deem most advantageous to the State. The commissioners of the sinking fund are declared by the law to be the governor, the attorney general, the comptroller general, the chairman of the ways and means of the house, and the chairman of the finance committee of the senate; and they are constituted by law as commissioners, to be designated as commissioners of the sinking fund, to receive the mortgage revenue of the State. The effect of that law is to constitute these gentlemen into one body, a unit acting as one body. They are what are known as a *quasi* corporation—that is to say, they have a corporate existence like any other body, a unity of action like any other corporation, and the action of any of that corporation is the act of the whole. The same law of South Carolina declares that the secretary of state shall take charge of all property of the State the care and custody of which is not otherwise provided by law, etc. So you see by the law of South Carolina the right to sell and convey and dispose of this property of the State is in the sinking-fund commissioners as the custodian and guardian. The protection of the property is left to the secretary of the State, who holds it subject to the direction and instructions of the sinking-fund commissioners. This being the general duty and general power of this board, remember it is a board acting just like a corporation, the board being limited only to the particular purpose for which it was created. The legislature in 1890 passed an act declaring that the commissioners of the sinking fund are authorized, empowered, and required at public sale and on such terms as may seem to them best to sell and convey all the right, title, and interest of the State into the certain building in the city of Columbia and the lot on which it stands known as Agricultural hall. We find that that act having been passed some time in 1893, an advertisement appeared in The State, a newspaper in the city of Columbia, headed, Sale of Agricultural hall. State of South Carolina, executive department, office of the secretary of the State, department of pubic lands, December 29, 1891, etc., and signed J. E. Tindal, secretary of state.

13

Mr. Tindal gives this account of that transaction: He says the property was first put up at public auction under instructions of the

commissioners of the sinking fund and bought in because the upset price, the price they valued it at, $20,000, was not bid; that it was held for a certain time, and that they lowered their idea as to the value of the property and concluded that $16,000 would be a fair price for it, and it having come to their knowledge
14 that Mr. Duncan was willing to give $16,000, with the understanding that it should be put up and sold again; that an informal meeting of the commissioners of the sinking fund was called, which was attended by all the members of the sinking fund board except two members, the chairman of the ways and means committee of the house and the chairman of the finance committee of the senate, and the result of that meeting—not put in any formal resolution—was the instruction to put up the property and sell it. Thereupon an advertisement was prepared, put in the newspapers, advertised for 30 days. The auction sale took place, which was attended by Mr. Means, the chief clerk, as general director, and by Mr. Tindal afterwards as an observant spectator; that at that sale the property was knocked down to Mr. Lyles, he being the highest bidder, and who gave his name as Mr. Lyles' attorney, indicating that he was acting for somebody else; that after that sale there was a meeting of the board of commissioners, and that at that meeting the deed was prepared complete in every respect except the name of the purchaser, which was left blank for reasons that gentleman had given and not yet signed by the commissioners, and that the board of commissioners at that meeting, with the exception of a single individual, Dr. Bates, signed it in the presence of witnesses and left the deed with Mr. Tindal. You have heard his testimony, and you are to determine from that testimony whether Mr. Tindal's action in the matter of advertising that property was done under the authority of this board, and if you come to the conclusion that there were some irregularities in this action, then you are to determine whether or not when the board, pursuant to the action, or, I should say, subsequent to that action, and, perhaps, in consequence of that action, executed a deed to that property and gave that deed into Mr. Tindal's
15 possession was or was not that a ratification by the board of everything that had been done previous to that time. If it was a ratification, then everything up to that point is smooth. It was the act of the board because every ratification makes an action, as it were, the act of the party itself. Now, this deed having been placed in the possession of Mr. Tindal, and I must say he was the proper person to hold it—this deed having been put in Mr. Tindal's possession, he tells you that they then looked after the execution of the bond and mortgage; that Mr. Lyles furnished him with the bond and mortgage, the date of which had been changed from the day of sale to the time it was signed in North Carolina; that upon consultation with the attorney general they came very properly to the conclusion that it would not do, and thereupon a new bond and mortgage were prepared bearing the proper date. The bond that was changed was shown to Mr. Tindal, and necessarily the name of the purchaser was disclosed to him because he signed the bond.

Mr. Means states that when Mr. Lyles and Mr. Tindal were talking together he, in their presence and from what he believed to be the instructions of Mr. Tindal, filled up the name of the purchaser on that deed; then Mr. Tindal goes right away, and the next thing we hear of the deed it was in the treasurer's office, and you know what transpired there.

Was that paper placed by the board of the sinking-fund commission in the hands of Mr. Tindal with full power in him to carry out all subsequent details and to clothe the transaction with their authority? That you must see by proof in the testimony. Or was it placed in the hands of Mr. Tindal as the agent of the board for their future direction in the matter? If it was placed by them in Mr. Tindal's possession with full authority to carry out the
16 entire details of the transaction, then Mr. Tindal would go on and complete it, anyway, reaching the conclusion of the sale, but if it was put in his hands simply because he was the general agent of the board, still subject to instructions of the board, he had no right nor had anybody acting for him or by his instructions or by his concurrence have any right so to do. You have heard the testimony and can judge of that yourself. The deed being in the treasurer's office, it lay on the desk of the treasurer and got into the possession of Mr. Lyles, who says it was formally delivered to him. The treasurer told you what he did and said. Now, you know the connection of the treasurer with this transaction. Did the treasurer have authority to deliver that deed? Do you see any evidence in the case that the treasurer did deliver that deed? If you do, then the delivery will be complete. The purchase-money having been paid, the bond and mortgage having been delivered, the sale was accomplished under the nature of that delivery. If the treasurer had no right and power in himself to deliver that deed—that is, being only one of the board and not the agent of the board—was his act in receiving the money and bond and mortgage and delivering the deed ratified by the board?

Dr. Bates tells you he has the check still in his possession. The bond and mortgage *was* put on record. It seems to me that the fact of retaining the bond and mortgage unexplained would be a ratification. You must determine that yourselves. But if there is any explanation in the evidence of this case which explains to you how it is the transaction stopped just there, no delivery of possession and no surrender of what has been received and no explanation of that, then the holding on of the check and the bond and
17 mortgage seems to be to me evidence of ratification. The evidence you must weigh and determine for yourselves. Now you have the case. If in all the steps of this transaction the evidence shows you that the proper authority was given Mr. Tindal to do what he did and the deed was delivered with Mr. Tindal's authority, concurrence, and assent, if he had the authority, then you must find a verdict for the plaintiff. If you think there was no delivery of the deed under those circumstances because the mere possession of the deed carries no title, the other question is a question of damages; but in an action of this kind the jury will give

what damages they please. One of the measures of damage is rental value. Some say that is not the only test. You can give any damage you please, and I have the right to express an opinion in this court. Under the circumstances of this case, where these two persons resisted possession while not enjoying possession, I would not give anything.

The jury retired and considered the case and returned into court with the following verdict:

"We find for the plaintiff the possession of the land in dispute as described in the complaint.

April 7th, 1894.

J. M. PRIOLEAU, *Foreman.*"

18 *Judgment.*

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

EDWARD B. WESLEY, Plaintiff,
vs.
J. E. TINDALL and J. R. BOYLES, Defendants. } Judgment.

This action having been brought to a trial at a circuit court held on the 4th day of April, A. D. 1894, before Judge Charles H. Simonton and a jury, and a verdict for Edward B. Wesley, the plaintiff, against J. E. Tindall and J. R. Boyles, the defendants, having been rendered therein by the jury on the 7th day of April, 1894, for the possession of the real estate in dispute and described in the complaint therein as follows, to wit, all that lot, piece, or parcel of land, situate in the city of Columbia, county of Richland, and State of South Carolina, containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street, and on the south and west by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Jent, sheriff of Richland county, by deed dated 3rd day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 106 & 107; also that certain parcel or lot of land situate, lying, and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the "Agricultural Hall" building and lot immediately in rear thereof, east by Richardson street, south by lot now or formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker, said lot being a rectangu-

19 lar parallelogram in shape and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-six feet and from east to west two hundred and eight feet, the said lot also joining a part of the Agricultural

Hall block and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated Dec. 11th, 1875, and recorded in R. M. conveyance office for Richland county in Book K of Deeds, pp. 319 & 320, the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston, dated April 9th, 1883, and recorded in R. M. conveyance office in Book P of Deeds, &c., p. 87, and the costs having been adjudged at fifty-three and $\frac{35}{100}$ dollars—

Now, on motion of Messrs. Lyles & Muller, attorneys for said Edward B. Wesley, plaintiff, it is adjudged—

That Edward B. Wesley, plaintiff, do recover of the defendants, J. E. Tindall and J. R. Boyles, the possession of the real property described in the complaint herein.

And further that he recover of the said defendants the sum of fifty-three and $\frac{35}{100}$ dollars, costs of this action.

LYLES & MULLER,
Plaintiff's Attorneys.

Signed, sealed, and entered this 7th day of May, 1894.

J. E. HAGOOD, [SEAL.]
C. C. C. U. S., Dist. S. C.

Filed 7th May, 1894.

20 *Execution.*

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

EDWARD B. WESLEY, Plaintiff, }
vs.
J. E. TINDALL and J. R. BOYLES, Defendants. }

To John P. Hunter, Esq., United States marshal, or his lawful deputies, Greeting:

Whereas judgment was rendered on the — day of May, one thousand eight hundred and ninety-four, for an action in the circuit court of the United States for the district of South Carolina, between Edward B. Wesley, plaintiff, and J. E. Tindall and J. R. Boyles, defendants, in favor of said Edward B. Wesley, plaintiff, against the said J. E. Tindall & J. R. Boyles, defendants, for the recovery of the possession of the following-described real estate, to wit, all that lot, piece, or parcel of land situate in the city of Columbia, county of Richland, and State of South Carolina, containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street, and on the south and west by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of

Richland county, by deed dated 3rd day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 106 & 107; also all that certain parcel or lot of land situate, lying, and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the "Agricultural Hall" building and lot immediately in rear thereof, east by Richardson street, south by lot now or formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker, said
21 lot being a rectangular parallelogram in shape and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-six feet and from east to west two hundred and eight feet, the said lot also adjoining a part *a part* of the "Agricultural Hall" block, and being the same lot of land formerly conveyed to Thomas B. Johnson by Asher Palmer, of Columbia, in said State, by deed dated Dec. 11th, 1875, and recorded in R. M. conveyance office for Richland county, in Book K of Deeds, pp. 319 & 320, the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston dated April 9th, 1883, and recorded in R. M. conveyance office, in Book P of Deeds, &c., p. 87, and also for the sum of fifty-three and $\frac{35}{100}$ dollars, costs and charges therein, as appears to us by the judgment-roll filed in the office of the clerk of the said court;

And whereas the sum of fifty-three and $\frac{35}{100}$ dollars, costs and charges as aforesaid, are now actually due thereon:

Therefore we command you that you deliver the property to the said Edward B. Wesley, plaintiff, and that you satisfy the said sum of fifty-three and $\frac{35}{100}$ dollars, costs and charges aforesaid, out of the personal property of the said judgment debtor- within your district belonging to the said judgment debtors on the day when the said judgment was so docketed in your district or at any time thereafter, in whose hands soever the same may be, and duly return this execution according to law to the clerk of the said court at Charleston, S. C.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., the 7th day of May, one thousand eight hundred and ninety-four.

LYLES & MULLER,
Plaintiff's Attorneys.

J. E. HAGOOD, [SEAL.]
C. C. C. U. S., Dist. S. C.

22 John P. Hunter, U. S. marshal for said district:

Levy and collect $53.35, with interest from the 7th day of May, 1894, besides your fees, &c.

LYLES & MULLER,
Attorneys for Judgment Creditor.

Attorney	$20 00
Clerk Hagood	20 35
Marshal Cunningham	13 00
	$53 35

Entered in execution docket, fol. 92, this May 7, 1894.

J. P. HUNTER,
U. S. Marshal.

Filed 7th May, 1894.

23 *Order Allowing State of South Carolina, Intervenor, until 1st August Next to Prepare Appeal and to Stay Execution.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

E. B. WESLEY, Plaintiff, }
vs.
J. E. TINDAL and J. R. BOYLES, Defendants. }

The State having intervened by suggestion of the attorney general, claiming the above case to be a suit against the State and claiming that said suit should be dismissed for that reason, and the same having been overruled—

It is ordered that the State of South Carolina have until the 1st day of August next within which to perfect its appeal and in the meantime that the judgment and execution be stayed.

CHARLES H. SIMONTON,
U. S. Circuit Judge.

May 8th, 1894.

Filed 9th May, 1894.

24 *Assignment of Errors.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY }
vs. } Assignment of Errors.
J. E. TINDALL and J. R. BOYLES. }

The intervenor, The State of South Carolina, appeals to the Supreme Court of the United States from the ruling and order of his honor Judge Simonton made in above-stated case on the 16 day of April, 1894, and assigns as error the following:

For that his honor erred in not dismissing the case upon the suggestion of the attorney general of South Carolina that this is really an action against said State, brought without her consent, the defendants denying having possession of the property in suit and claiming to have custody of said property for the said State, said State not being a party to the record, though a party in fact, the alleged cause of action being contractual in its nature, in that

whatever rights the plaintiff has are derived from his contract with the State and the property involved in this litigation being claimed by the State.

O. W. BUCHANAN,
Attorney General of South Carolina.

June 16th, 1894.

Filed 18th June, 1894.

25 *Petition for Writ of Error & Order Allowing Writ.*

THE UNITED STATES OF AMERICA, }
District of South Carolina, }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY }
vs. }
J. E. TINDALL and J. R. BOYLES. }

The attorney general, on behalf of the State of South Carolina, having intervened in above-stated case, and the intervention having been overruled: Now, the said State of South Carolina, conceiving itself aggrieved by the order entered herein on the 16th day of April, 1894, doth hereby appeal from said order to the Supreme Court of the United States, and said appellant prays that a writ of error may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

O. W. BUCHANAN;
Attorney General of South Carolina.

Columbia, S. C., May 14th, 1894.

And now, to wit, on June 18th, 1894, it is ordered that the writ of error be allowed as prayed for.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 18th June, 1894.

26 *Appeal Bond.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY }
vs. }
J. E. TINDAL and J. R. BOYLES. }

Know all men by these presents that we, the State of South Carolina, by B. R. Tillman, governor, and Wilie Jones, of Richland county, in the State of South Carolina, are held and firmly bound

unto the above-named Edward B. Wesley in the sum of twelve hundred and fifty dollars, to be paid to the said Edward B. Wesley; for the payment of which, well and truly to be made, we bind ourselves and each of us, and our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 14th day of May, 1894.

Whereas the above-named State of South Carolina has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of South Carolina: Now, therefore, the condition of this obligation is such that if the above-named State of Carolina shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; other-
27 wise the same shall be and remain in full force and virtue.

B. R. TILLMAN,
As Governor.

Attest:

[SEAL.]

J. E. TINDAL,
Sec. State South Carolina.
WILIE JONES.

Sealed and delivered and taken and acknowledged this 14th day of May, 1894, before me—

[SEAL.]

D. H. MEANS,
Notary Public, S. C.

THE STATE OF S. C., }
Richland Co. }

Personally appeared before me Wilie Jones, one of the sureties to the foregoing bond, and made oath that he is worth the sum of twelve hundred dollars over and above all liabilities and exemptions.

WILIE JONES.

Sworn to before me this 14th day of May, 1894.

[SEAL.]

D. H. MEANS,
Not. Pub., S. C.

Approved.

CHARLES H. SIMONTON,
Circuit Judge.

18th June, 1894.

Filed 18th June, 1894.

28 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the circuit court of the United States for the district of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Edward B. Wesley, plaintiff, and J. E. Tindal and J. R. Boyles, defendants, and The State of South Carolina, intervenor, a manifest error hath happened, to the great damage of the said State of Carolina, intervenor, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the 18th day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 18th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Seal U. S. Circuit Court, District of So. Carolina.

J. E. HAGOOD,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by—
CHARLES H. SIMONTON,
Circuit Judge.

[Endorsed:] Filed 18 June, 1894. J. E. Hagood, C. C. C. U. S., dist. S. C.

29 UNITED STATES OF AMERICA, *ss*:

The President of the United States to Edward B. Wesley, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at Washington, on the eighteenth July, 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein The State of South Carolina, intervenor, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles H. Simonton, judge of the circuit court of the United States, this 18th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES H. SIMONTON,
Circuit Judge.

30 [Endorsed:] Filed 18 June, 1894. J. E. Hagood, C. C. C. U. S., dist. S. C.

Service of within citation accepted this 18th day of July, 1894.

LYLES & MULLER,
Pl'ff's Att'ys.

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31 *Agreement of Counsel.*

EDWARD B. WESLEY, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Defendants.

Summons.
Complaint.
Answer.
Suggestion and intervention of attorney general.
Decision of Judge Simonton refusing the suggestion, deciding that the State is not a party, saying: "This case is on all fours with the case of U. S. *vs.* Lee." Exception was duly taken and noted.
Charge of Judge Simonton to jury, and verdict.
Appeal and allowance.
Bond.
Assignment of error.

We agree that the foregoing shall constitute the matters on which this case shall be heard in the Supreme Court of the United States.

O. W. BUCHANAN,
Attorney General.
LYLES & MULLER,
Pl'ff's Att'ys.

Filed 12th July, 1894.

32 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of all the records and proceedings as agreed upon by counsel in the case of Edward W. Wesley, plaintiff, against J. E. Tindal and J. R. Boyles, defendants, and The State of South Carolina, intervenor, rendered as aforesaid, together with all things relating to the same, as appears by the records now on file in my office.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., in the district aforesaid, this 16th day of July, A. D. 1894.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

[Endorsed:] No. roll, —. United States of America, district of South Carolina, fourth circuit. In the circuit court. —— ——, complainants, against —— ——, defendants. —— ——, solicitor. Entered on journal, page —. Filed — day of ——, 189–. —— ——, C. C. C. U. S., dist. S. C.

Endorsed on cover: Case No. 15,680. South Carolina C. C. U. S. Term No., 796. The State of South Carolina, plaintiff in error, *vs.* Edward B. Wesley. Filed September 10th, 1894.

FILED
NOV 30 1894
JAMES H. McKENNEY,
CLERK

MOTIONS TO DISMISS AND TO AFFIRM.

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

(15,680.)

ROBERT W. SHAND, COLUMBIA, S. C.,
Counsel for Def't. in Error for the Purposes of these Motions.

MOTIONS TO DISMISS AND TO AFFIRM.

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Counsel for Def't. in Error for the Purposes of these Motions.

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(15,680.)

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

Comes now the defendant in error by his counsel appearing in that behalf and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction because the judgment brought up on said writ of error is the judgment of the Circuit Court of the United States for the District of South Carolina sitting at Charleston, in a cause entitled Edward B. Wesley, plaintiff, vs. J. E. Tindal and J. R. Boyles, defendants, the State of South Carolina not having been a party to said cause, having no interest therein, and not having intervened or submitted her rights to the judgment of the Court; and not having excepted to any ruling of the Court below.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the judgment brought up by said writ of error, because, although the record of the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was frivolous and was taken for delay only.

R. W. SHAND, Columbia, S. C.,
Counsel for Defendant in Error for Purposes of These Motions.

(15,680.)

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

To J. J. Darlington, Esq., Counsel for Plaintiffs in Error.

Please take notice that on Monday, the 19th day of November, A. D. 1894, at the opening of the Court, or as soon thereafter as Counsel can be heard, the motions of which the foregoing are copies, will be submitted to the United States Supreme Court at Washington, D. C., for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

R. W. SHAND, Columbia, S. C.,
Counsel for Defendant in Error for the Purposes of These Motions.

ABSTRACT OF CASE.

This cause is brought up to this Court by Writ of Error to the Circuit Court of the United States for the district of South Carolina at Charleston. Only one error was assigned in the Court below and no exception, whatever, was there taken.

The question arose thus, to-wit: The action was brought on the law side of the Circuit Court of the United States for the district of South Carolina by Edward B. Wesley, a Citizen of the State of New York, against J. E. Tindal and J. R. Boyles, Citizens of the State of South Carolina, to recover the possession of a certain lot of land situate in the City of Columbia and State of South Carolina, of the value of $16,165.00, known as the "Agricultural Hall," and damages for its detention. The Complaint was in the ordinary form. The answers of the defendants comprised first: a general denial of the allegations of the Complaint, and, second: a denial that they were in possession of the property in their individual capacity, and an allegation that they held the property as public officers in the right of the State of South Carolina.

Upon the trial of the cause the plaintiff proved that the State of South Carolina had been the owner of the property and that it had been sold at public auction after due advertisement by the Commissioners of the Sinking Fund, on the first Monday in February, 1892, under an Act of the General Assembly of that State, and was purchased by one J. W. Alexander at the price of $16,165.00, and that Alexander had complied with the terms of sale by paying to the State Treasurer one-third of the purchase money in cash and executing to him his bond and mortgage of the premises for the balance of the purchase money, and had received a deed for the premises in due form, executed by the Commissioners of the Sinking Fund and delivered by the State Treasurer.

The cause came to be tried in said Court on the 4th day of April, 1894, His Honor, C. H. Simonton, Circuit Judge, presiding. (See printed Transcript of Record p. 7.) The trial continued until the 7th day of April, 1894, and resulted on that day in a verdict for the plaintiff against the defendants. (Printed Transcript of Record p. 7.) At the commencement of the trial of the cause, the Attorney General of the State of South Carolina filed and brought to the attention of the Court the paper, styled "Suggestion of Attorney General," (printed Transcript, p. 5.) as follows, to-wit:

"And now comes O. W. Buchanan, attorney general of

the State of South Carolina, and suggests to the court and gives it to understand and be informed that the property in controversy in this action is held, occupied, and possessed through its officer and agent charged in behalf of the State of South Carolina with the custody and control of the property by virtue of the statute in such case made and provided and who is custodian of the same for and in the name of the State of South Carolina, which said property is now used by the State of South Carolina for public uses.

Wherefore, without *submitting the right* of the State to the jurisdiction of the Court, but respectfully insisting that the Court has no jurisdiction of the subject in controversy, he moves that the complaint in said action be set aside and all the proceedings be stayed and dismissed and for such other orders as may be proper in the premises."

O. W. BUCHANAN,
Attorney General, South Carolina."

He thereupon moved to set aside the complaint and stay the proceedings in the cause. This motion was orally refused by the presiding judge and no exception was taken so far as disclosed by the record. On the 16th of April, nine days after the cause had terminated and without notice to the parties to the cause, the presiding judge filed the order found on pp. 6 and 7, printed Record. No exception has been taken to that order.

The assignment of errors (printed record, p. 14) specifies only one ground of error, to-wit:

"For that his honor erred in not dismissing the case upon the suggestion of the attorney general of South Carolina that this is really an action against the State, brought without her consent, the defendants denying having possession of the property in suit and claiming to have custody of said property for the said State, said State not being a party to the record, though a party in fact, the alleged cause of action being contractual in its nature, in that whatever rights the plaintiff has are derived from his contract with the State and the property involved in this litigation being claimed by the State."

GROUNDS OF MOTION.

1.

The Defendant in error submits that the writ of error should be dismissed.

1. Because the plaintiff in error was not a party to the cause below and her rights were in no wise affected by the judgment of the Court below.

2. Because no exception was taken to the order complained of.

3. Because the order complained of was not such an order as could be reviewed by this court upon writ of error.

2.

If the court should conclude that it has jurisdiction of the said cause then defendant in error submits that the judgment of the Court below should be affirmed because the only ground upon which error in the Court below was predicated was frivolous and the writ of error was sued out merely for delay, the ruling of the Court below being sustained by a long line of precedents in this court.

ARGUMENT.

AS TO THE MOTION TO DISMISS.

1. The State of South Carolina was not a party to the record in the Court below and was not an intervenor in such sense as to give her an appealable interest in the cause. She refused to submit her rights to the jurisdiction of the Court below and the only ground upon which the motion of her attorney general was heard at all, was that of courtesy; as it were as *amicus curiæ*. The judgment entered upon the verdict in no wise affected her rights. The action was against the defendants in the Court below as individuals for individual wrongs committed. The error complained of is not that the plaintiff in error was refused leave to intervene, but it is that the Court below, without her intervention, refused upon a mere suggestion on her part to dismiss the Complaint against the defendants who were sued as individuals.

In Bouvier's Law Dict. "intervention" is defined to be "the Act by which a third party becomes a party in a suit pending between other persons." The State of South Carolina certainly did not become even a *quasi* party such as is referred to in the case of *Williams* vs. *Morgan*, 111 U. S., 684. (L. C. P. ed. 585.) The point comes directly under the ruling of this Court, in the case of *Georgia* vs. *Jesup*, 106, U. S., 458. (L. C. P. ed. 216,) where it was ruled, Justice Harlan delivering the opinion of the Court, that

"In a foreclosure suit pending in the Circuit Court, the mortgage property being in possession of its receivers, the State of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the

property in their hands upon some of which executions for State taxes had been levied prior to their appointment. The petition was denied and dismissed. Held, that the action of the Court could not be reviewed upon the appeal of the State, for the reason, if there were no others, that the order did not conclude any right it had in virtue of the executions, or of the levies made thereunder."

2. There having been no exception taken in the Court below as disclosed by the record, there was no question which could be brought to this Court for review.

3. The writ of error directed to the Court below, was only directed to the bringing up of the order of the 16th of April, 1894. Now, the record shows that that paper, call it an order or what you will, was signed by the Circuit Judge, who had presided at the trial of the cause, nine days after the hearing of the cause had ended. It was signed apparently *sua motu* and seems to have been intended rather as an authoritative statement of his views on the question which had been presented on the trial. It certainly was not an order affecting the cause in any wise.

AS TO THE MOTION TO AFFIRM.

Even if the Court should conclude that it has jurisdiction in the matter, we submit that the ruling of the Court below on the question presented was according to precedents and the appeal therefrom is frivolous.

That the motion will be entertained by this Court upon this ground is clear.

"In *N. Y. & N. E. R. R. Co.* vs *Town of Bristol*, U. S. Sup. Ct., Feb. 5, 1894, the Ch. Justice held "A motion to dismiss the writ of error for want of jurisdiction is now made, and with it is united a motion to affirm on the ground, in the language of our rule (Rule 6, Par. 5,) "that although the record may show that this Court has jurisdiction, it is manifest that the writ or appeal was taken for delay only or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

"We agree with Counsel that this Court has jurisdiction, but are of the opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said, under the circumstances, to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

And we need only to present the decisions to show that

"*the principles to be applied are so well settled as not to need further argument.*"

Since the case of *U. S.* vs. *Lee*, 106 U. S. 172, (L. C. P., Co ed.) it cannot be doubted that the mere claim of one in possession of real estate to hold it as a public officer for and on behalf of his government is not sufficient to oust the courts of jurisdiction in an action to recover the possession of the property.

In that case quoting the language of Chief Justice Marshall in another case, it is said, "*It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of courts and prevent their looking into the suggestion* and examining the validity of the title." Then proceeding the Court says, "These decisions have never been overruled. On the contrary, as late as the case of *Davis* vs. *Gray*, 16 Wall, 204 (83 U. S., XXI., 447,) the case of *Osburn* vs. *Bank*, is cited with approval as establishing these among other propositions:

"'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State, in all respects as if the State were a party to the record.

"'In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.'

"This examination of the cases in this court establishes clearly the result: That the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period the court has held the principle to be unsound, and in the class of cases like the present,

represented by *Wilcox* vs. *Jackson*, *Brown* vs. *Huger* and *Grisar* vs. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

Again the same principle was held in the recent case of *Stanley* vs. *Schwalby et al.*, 147 U. S. 259 (L. C. P. Co. ed.,) decided 6th February, 1893. This, like the case at bar, was an action of trespass to try title. The defendants "pleaded not guilty and specially that they held lawful possession of the property as officers and agents of the United States."

The Court says: "In these cases he is not sued as an officer of the government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included *United States* vs *Lee*, 106 U. S. 196 (27-171,) where the action of ejectment was held to be in its essential chara ter an action of trespass, with the power in the Court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense."

Robert W. Hand.

Office Supreme Court, U. S.
FILED
NOV 30 1894
JAMES H. McKENNEY,
CLERK

BRIEF OF ARGUMENT AGAINST MOTION TO DISMISS AND TO AFFIRM.

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

versus

EDWARD B. WESLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA,

15,680.

SAM'L W. MELTON, Columbia, S. C.,

Counsel for Plaintiff in Error as to these Motions.

BRIEF OF ARGUMENT AGAINST MOTION TO DISMISS AND TO AFFIRM.

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SAM'L W. MELTON, Columbia, S. C.,

Counsel for Plaintiff in Error as to these Motions.

STATEMENT OF PLAINTIFF IN ERROR.

This case is in many respects similar to that of *U. S.* v. *Lee*. But under the Act of 1891, the defendants below, in ejectment at the suit of Edward B. Wesley, were required to sue out their Writ of Error in the U. S. Circuit Court of Appeals, for the Fourth Circuit, and their case is there pending upon a Transcript of Record, properly returnable to that Court.

In order that the motion now before this Court may be fully comprehended, the plaintiff in error asks leave to append to this argument a certified copy of the Transcript of Record, entitled: J. R. Tindal and J. R. Boyles, Plaintiffs in Error, *vs.* Edward B. Wesley, Defendant in Error,—the certificate of the Clerk, under the seal of the Court, containing the statement that "the said cause has been argued, and is under consideration in the said Court."

If the Court please, reference will be made to this Record, as often as may be necessary.

It appears from this Record, that the *first exception* at the trial below was made to the exclusion of testimony as to fraud in the deed under which the plaintiff claimed title to the property in controversy; Record C. C. A., pp. 37-39. The *second exception* was taken to the ruling of the Court upon the motion of defendants to dismiss the cause on the ground of want of jurisdiction—*the defendants not being proper parties* to the action. "The defendants contended that they were mere custodians "and caretakers of the premises, not in possession or having any "interest therein." Record, C. C. A., p. 39.

The *third exception* was taken to the ruling of the Court in holding that "this cause is not in effect a suit against the "State."

In the "Abstract of the Case," page 5, it is stated that at the trial "no exception whatever was taken." This is not correct. Exception was then taken, and the fact appears upon the Record (page 18), that to the "decision of Judge Simonton refusing the suggestion, on the ground that the State was not in effect a party to the suit, exception was duly taken and noted." Inad-

STATEMENT OF PLAINTIFF IN ERROR.

This case is in many respects similar to that of *U. S.* v. *Lee*. But under the Act of 1891, the defendants below, in ejectment at the suit of Edward B. Wesley, were required to sue out their Writ of Error in the U. S. Circuit Court of Appeals, for the Fourth Circuit, and their case is there pending upon a Transcript of Record, properly returnable to that Court.

In order that the motion now before this Court may be fully comprehended, the plaintiff in error asks leave to append to this argument a certified copy of the Transcript of Record, entitled: J. R. Tindal and J. R. Boyles, Plaintiffs in Error, *vs.* Edward B. Wesley, Defendant in Error.—the certificate of the Clerk, under the seal of the Court, containing the statement that "the said cause has been argued, and is under consideration in the said Court."

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vertently, a formal bill of exceptions is omitted from the Record: but it is submitted that the "agreement of counsel" cures this defect. "A Bill of Exceptions is not indispensable when the error is apparent on the face of the record, whether it be made to appear by bill of exceptions, or in any other manner." *Bennet* v. *Butterworth*, 11 How., 669, 676; *Sugdan* v. *Williamson*, 20 How., 427; *Coughlin* v. *District of Columbia*, 16 Otto, 7, 11.

Besides, "when an appeal is regularly before the Court, it cannot be dismissed for want of jurisdiction, because the record shows no bill of exceptions, or anything on which error may be assigned. The practice in such cases is to affirm. *James* v. *Bank*, 7 Wall., 693.

The Abstract is also incorrect in the statement that the answers of the defendants below contain "an allegation that they "'*held*' the property as public officers in the right of the State "of South Carolina." The answers set forth the relation of the defendants to the property as that of mere care-takers—custodians; the defendants having "no right, title, interest or estate therein of any kind whatsoever;" but that "the premises are the property and in the possession of the State, and in actual public use"; Transcript of Record, C. C. A., pp. 9–10. In the Supreme Court Record, folios 12-13, the relation of the defendants below is accurately stated by Judge Simonton, in his charge to the jury—printed in full by agreement of counsel, and see folio 17, where, as to damages, Judge Simonton instructed the jury as follows: "Under the circumstances of this case, where these two persons *resisted possession while not enjoying possession*, I would not give anything."

So, it appears that the defendants in the main case below were not in possession of the premises, either actually or constructively, and were not tenants in the sense which rendered them proper parties to an action *in ejectment*.

ARGUMENT

Against the Motion to Dismiss.

The case is regularly in this Court, upon error assigned, clearly within the jurisdiction of this Court.

No objection was taken below to the Suggestion, except upon the merits. It was dismissed; not on the ground that the Circuit

Court was without jurisdiction to entertain the motion and pass upon it; but upon the merits—on the ground that this was not in effect an action against the State, in the sense intended by the Eleventh Amendment of the Constitution of the United States.

In a line of cases from *Blossom* v. *Milwaukee*, 1 Wall., 655, to *Williams* v. *Morgan*, 111 U. S., 684, it has been held that persons not parties to the record may intervene in the Circuit Court and take their writ of error, on the ground that they have an actual interest in the event of the suit, and are therefore entitled to be heard *pro interesse suo*. It is not necessary that they be by name made parties. Their right to a day in Court, whether it exist before or arise pending the action, depends upon the fact of interest in the subject-matter, to be affected by the event of the cause. In such cases motions to dismiss have been granted; but always upon the ground that the party has not such an interest as may be prejudiced by the judgment. He is designated as a *quasi* party; but this is a mere fiction, and does not confine the reason of the thing to persons who acquire interests pending the action.

The Eleventh Amendment prohibits suits against the State; and therefore the State is not a party named upon the record below. It is urged that this exemption may be waived. But to this end, a statute is necessary. Meantime, the action may proceed from summons to judgment; while the nominal defendants are not under obligation to plead to the jurisdiction. In such case, the cause may proceed to execution, and the real party in interest be deprived of a substantial right. This is the argument which allows a place to *quasi* parties. Why not extend it to the State, for the stronger reason? Else, in the discretion of this Court, the State must be directly wronged, or hasten to provide legislation whereby she is forced to forego all benefit and exemption under the Constitutional inhibition. This is, by indirection, to nullify the provision of the fundamental law; or probably subject the State to wrong, because of necessary delays in procuring the legislative sanction, to its humiliation in Court.

But, it is urged, the rights of the State are "in no wise affected by the judgment of the Court below." This depends upon the question whether the State is, in effect, a party to the action; and this must depend upon the circumstances of each case—a question which can only be properly determined by a hearing upon the merits.

In *Georgia* v. *Jessup*, 106 U. S., 458, the opinion reads: "It is sufficient to say that the order denying and dismissing the petition is not one which the State can ask this Court to review upon its appeal: for the reason already indicated, if there was no other, that the order did not conclude the State—it being no party to the suit—as to any right acquired in virtue of the execution for taxes. * * * In no legal sense has the State been injured by the order dismissing its petition."

This decision was rendered after a hearing on the merits.

In every case of like circumstances, *Georgia* v. *Jessup*, may be applicable. It will be observed that this case was decided at the same term as *U. S.* v. *Lee*, 106 U. S., 196, where the State was heard precisely as in our case. The question at issue in the former case was whether the Circuit Court of the United States would recognize and enforce a lien belonging to the State, or leave it to be adjusted by another tribunal.

The case now before the Court is essentially different.

Here is an action in ejectment, for the recovery of property, claimed to belong to the State, admittedly in the possession of the State, and in actual public use; not against the tenants in possession, but against mere care-takers, who have no legal interest in the property—no interest except that of mere servants; not in law different from the relation of an ordinary real estate agent, or a mere laborer for hire. *Here, the judgment goes directly against the property of the State!* Upon a decision affirming the judgment below, will proceed a writ of possession, by virtue of which the Marshal will be required to wrest from the State property actually in its possession and in actual public use, and vest the ownership and possession of it in a private citizen, the defendant in error.

This may be the final decision. Our contention here is that it will not be rendered, except upon the full hearing on the merits.

The State House in Columbia, S. C., is under the care of the Secretary of State, who bears to it precisely the same relation that he bears to the property here in controversy; not that of tenancy or occupancy in any sense of these terms. The case is not different from that where, under a fraudulent deed executed by the Commissioners of the Sinking Fund, a citizen should sue the Secretary of State in ejectment for possession of the State Capitol.

Whatever may be the decision of the Circuit Court of Appeals, it may be assumed that the case will be brought to the Supreme Court; and heard with the case now before this Court—in the same plight as was the case of *U. S.* v. *Lee*.

In Lee's case a similar suggestion was entertained without objection. Mr. Justice Miller, delivering the opinion of the Court, says: "As the United States was not a party to the suit "below, and, while defending the action by its proper law "officers, expressly declined to submit itself as a defendant to "the jurisdiction of the Court, there may exist some doubt "whether it has a right to prosecute a writ of error in its own "name; but as the judgment against Kaughman and Strong is "here on their writ of error, under which all questions are "raised which could be raised under the other, this writ being "prosecuted in the interest of the United States and argued here "by the Solicitor General, the point is immaterial and the ques-"tion has not been mooted."

It will first be observed that, while the point is waived, Mr. Justice Miller refers to the question as one of "some doubt" which "may exist" as to whether the United States has a right to prosecute a writ of error, in that cause, in its own name. The doubt is thus stated as one of vague import. The writ of error, however, was entertained, and the case goes down in the lead, in the name of the United States.

A careful study of the entire line of cases on this point will establish the proposition that it is addressed to the discretion of the Court, unfettered by any cast-iron rules.

If the point was immaterial in *United States* v. *Lee*, it is immaterial here, and in the discretion of this Court the plaintiff in error submits that the motion of the defendant in error will be postponed until a decision can be rendered upon the merits in this Court—in both cases to be heard together.

It will add force to this suggestion if it be considered that, while the jurisdictional question in *U. S.* v. *Lee* turned upon a rule at the common law, it here turns upon a mandate of the Constitution of the United States, under which the State is protected by the highest and most imperative sanction, and is entitled, therefore, in the highest degree, to the courtesy, the comity and the most favorable consideration of this Court. What was there accorded to the United States will be accorded for like sufficient reasons to the State of South Carolina.

If the State may not be regarded as a "quasi party."—while clearly it is the real party directly in interest—its suggestion may be entertained under the license accorded to the *amicus curiæ*.

Even in the case of private persons, the rule which forbids their intervention unless they submit themselves to the jurisdiction of the Court, does not always prevail. In *Day* v. *Washburn*, 23 How., 309, an *Amicus Curiæ* was permitted to come into this Court and suggest that a cause then pending should be dismissed for want of jurisdiction. The suggestion was entertained and considered; whereupon, the intervening party had leave to bring the motion "to the notice of the Court again, "when the case shall be argued upon the merits." By so much the more urgency may we insist that the motion now before the Court, in deference to the authority of the Constitution, as well as to the sovereignty of the State, be postponed until the question of jurisdiction be considered at the hearing upon the merits.

AS TO THE MOTION TO AFFIRM.

In the argument of counsel for the motion, nothing seems to be based upon the ground that the writ herein was taken for delay only, unless it may be involved in the second ground that the question involved is so frivolous as not to need further arguments. Is this ground well taken?

In the affirmative, quotations are submitted by counsel: *U. S.* v. *Lee*, 106 U. S. 196; *Osborn* v. *Bank*, 9 Wheat., 738; *Davis* v. *Gray*, 16 Wall, 204; *Stanley* v. *Schwalby*, 147 U. S. 259.

The cases of *Osborn* v. *Bank* and of *Davis* v. *Gray* are well established, affirming a recognized rule of constitutional construction. But the rule is limited and specific. The full force of the Eleventh Amendment is acknowledged: but as all of the provisions of the Constitution and of the laws made in pursuance thereof must be construed *in pari materia*, the Eleventh Amendment cannot be construed to operate so as to nullify the laws of the United States, by protecting a State in the forcible, violent and wanton enforcement of a State Statute passed in violation of the Constitution of the United States.

There is no analogy between the case now before the Court and those in which the doctrine invoked is thus admitted to be firmly established. Nor is there any analogy between our case

and that of *U. S.* v. *Lee*, except the bare fact that both are cases in ejectment.

The record shows that the premises in question were sold at auction by the Commissioners of the Sinking Fund, under the authority of an Act of the General Assembly of the State of South Carolina, 20th Statutes at Large, page 707, for the purpose of appropriating the proceeds in aid of Clemson College, an institution of learning conducted under the patronage of the State. They were purchased by one Alexander, the grantor of the defendant in error. This Board consisted of the Governor, the Attorney-General, the Comptroller-General, the Treasurer, the Chairman of the Finance Committee of the Senate and the Chairman of the Committee on Ways and Means of the House.

Possession was demanded by the defendant in error of the plaintiffs in error, Boyle and Tindal, the former referring the attorney making the demand to the Secretary of State, who referred him to the Commissioners of the Sinking Fund, under whose direction and instructions he was acting as custodian. If any officers of the State held actual possession under the authority of the State, it was held by this Board. The premises, by the way, were then in the actual possession, in part of tenants paying rent, and in part of the Railroad Commissioners. *No demand was made directly either on the Commissioners of the Sinking Fund or on the tenants actually in possession.* (Record, testimony of Lyles and Tindal, pp. 9–25.)

In *U. S.* v. *Lee*, pp. 206, 208, Mr. Justice Davis says: "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our Courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of Courts of its own creation, to defend itself from assaults in those Courts * * * *

"Under our system the *people*, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is

well administered. When he, in one of the Courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

With such prepossession of opinion, it is not surprising that the Supreme Court should hesitate to interpose this principle to sustain the United States in a grievous wrong and forcible injury to the right of the citizen in the property at Arlington. But can it be said that the Court would have held the same opinion if it had been confronted by a solemn and imperative mandate of the Constitution of the United States? Can this mandate be put aside, simply because it does not agree with our conceptions of what is right or expedient? We are not taking refuge behind an unconstitutional Statute of a State: we are not in violation of any law of the United States which can operate to avoid the application of the protection we invoke: we are simply holding up the impenetrable shield of the supreme law of the Nation.

Besides, the opinion in *U. S.* v. *Lee* is directed against the "claim of one in possession": it being admitted that the estate of Arlington was held in *actual possession* by the defendants, Kaughman and Strong, officers of the U. S. Army.

So in *Stanley* v. *Schwalby*, 147 U. S., 508. The question as to the character of the possession was not mooted in either case.

Our case is in ejectment—technically, in tort: but essentially it involves matter of contract. It is founded, not in actual trespass—not on the forcible, wanton and outrageous taking of property. It arises solely out of the contract between the State, represented by the Commissioners of the Sinking Fund, and the Defendant in Error, in the making of which this party, as we endeavored to prove, took a fraudulent advantage of the State by purchasing the property for which he did not intend to pay: giving his bond to pay in money the price which he contracted to pay, with the secret intention not to pay it except with a void, dishonored and worthless scrip. Dr. Webster defines fraud in law: "An intentional perversion of truth for the purpose of "obtaining some valuable thing or promise from another." He gives many synonyms.

The mere form of the action does not affect the real character of the controversy; and we submit that this contention shall be decided as if it were an action upon contract. Save that the party suing has an adequate remedy at law, it might rather be considered as in the real nature of a suit to enforce the specific performance of a contract—the object being to compel a delivery of possession, the right to which arises out of the contract, and is not the result of tort. To such an action, it is submitted that it accords with the spirit as well as the letter of the now established doctrine upon this topic, to hold that the State is a necessary party.

Moreover, in this action, brought against the mere agents of the State, not in actual possession, the State becomes a necessary and indispensable party. If the action had been brought against a tenant in possession, our position might not be maintained; but being against persons whose relation to the property must be considered as that of mere agency, the necessity for the presence of the State on the record, and in Court, becomes imperative. In all the cases on this topic, where the jurisdiction has been maintained, it has been conceded on the ground that the State is not a necessary party to the action. This was conceded at the outset in the language of Chief Justice Marshall, in *U. S.* v. *Peters*, quoted in *U. S.* v. *Lee*, page 210: "The State cannot be made a defendant to a suit brought by an individual, but it remains a duty of the Courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, when a State *is not necessarily a defendant*." The entire proposition is dependent upon the condition which we have italicized.

In *Cunningham* v. *Macon*, 109 U. S., 446, 451, the proposition takes positive form. The Court say:

"Whenever it can be clearly seen that the State is an indis-
"pensable party to enable the Court, according to the rule which
"governs its procedure, to grant the relief sought, it will refuse
"to take jurisdiction."

In this case, it was held that the State was an indispensable party. Here, as in our case, it was said that the *State* was, through its officer, "in actual possession of the property, and the Court can give no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and the possession." This, although clearly the property was in the actual possession of agents of the State.

The conduct of the State may have been wrongful. Nevertheless, she had possession of the property; and was exempt from suit because the exigency of the writ could not avail to afford the desired remedy.

Even if it be held that the Secretary of State is in actual possession, it is *clearly* shown that he holds as an officer, an agent of the State; and his possession is the possession of the State. Then, it is gravely proposed to issue out of the United States Court a writ of possession, under which to seize property in the possession of the State, in the face of the principle here announced in *Cunningham* v. *Macon*.

It is submitted upon the facts, then, that this action is in effect "a suit against the State."

The Osborn case to the contrary, it is now well settled that an action, though in form against a person who is an officer of the State, whether he be sued personally or officially, if it be in fact a suit directed against the property of the State, cannot be maintained even though the State is not made a party: *Louisiana* v. *Jumel*, 107 U. S., 711; *Cunningham* v. *Macon*, 109 U. S., 446; *Hagood* v. *Southern*, 117 U. S., 52; "*In re Ayers*," 123 U. S., 443.

Upon the principles of these cases, in this as well as in other particulars, our argument will be rested.

Louisiana v. *Jumel*, *supra*, was a proceeding in *mandamus* to compel the fiscal officers of the State to apply moneys in the State Treasury to the payment of the coupons of certain bonds of the State, in accordance with the contract between the State and the holders of these bonds. After the issue of the bonds payment was refused in obedience to the requirements of an Ordiance of Louisiana, adopted in Constitutional Convention, forbidding such payment. A bill was also filed against the officers for an injunction forbidding them to recognize as valid said Ordinance, and forbidding them to oppose the full execu-

tion of the Act which had authorized the issue of the bonds, and which had been ratified by a Constitutional amendment. Here was a case in every material particular the same in principle as the case of *Osborn* v. *Bank of United States*. But it was *held*:

"1. That the Ordinance forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect.

"2. That the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against officers who are merely obeying the positive orders of the supreme political power of the State.

"3. That at the time the bonds were issued, or since, no statute or judicial decision authorized a suit against Louisiana in her own Courts, nor can she be sued in the Courts of the United States by a citizen of another State.

"4. That the money in her treasury is her property, held by her officers, not in trust for her creditors nor as their agents, but as her servants, and that the Courts cannot control them in the administration of her finances, and thus oust the jurisdiction of the political power of the State."

The Court endeavored to distinguish this case from *Osborn* v. *Bank of United States*, *supra*, and the cases following the lead of it; but after considering the dissenting opinions of Justices Field and Harlan, it seems hard to avoid the conclusion that the spirit and energy of the decision is seriously weakened, if not destroyed; although in terms they are not overruled. The Court denied the jurisdiction, in obedience to the Eleventh Amendment; and in the concluding paragraph of the opinion, page 728, say:

"When a State submits itself, without reservation, to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the Courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

In *Cunningham* v. *Macon*, Mr. Justice Miller, after laying down the general principle that a State cannot be sued without its consent, says: "This principle is conceded in all cases, and "whenever it can be seen that the State is an indispensable party "to enable the Court to grant the relief sought, it will refuse to "take jurisdiction" In the *Ayers* case, it is held that it is not conclusive "of the principal question in this case that the State "of Virginia is not named as a party defendant. Whether it is "the actual party, in the sense of the prohibition of the Consti-"tution, must be determined by a consideration of the nature of "the case as presented on the whole record" In Peanoyer's case, it is said: "The Court will look behind and through the "nominal parties on the record to ascertain who are the real "parties to the suit."

As we have shown, looking through the nominal parties, this is an action which directly involves real property now held in possession by the State under claim of title; that the issue involved is whether the contract under which plaintiff below claims title is effectual to that end, thus bringing into controversy, under the guise of an action in ejectment, a matter arising purely out of contract alleged to have been made between the said plaintiff and the State; that the remedy sought would be enforced directly against the property claimed by the State in possession so as thereby to force the State to comply with its alleged contract to deliver possession of the premises in dispute; and that, as matter of law, to such an action the State is an indispensable party.

Mr. Justice Miller remarks, in *Cunningham's* case, that in regard to both classes of cases, (one involving rights claimed on behalf of the United States, the other rights claimed by the State) "the questions raised have rarely been free from difficulty, "and the Judges of this Court have not always been able to "agree in regard to them. Nor is it an easy matter to reconcile "all the decisions of the Court in this class of cases." The opinion is a clear, concise exposition of the law on this topic, rendered by the Justice who delivered the opinion in *U. S.* v. *Lee*.

This case was an action to foreclose a second mortgage against the Macon and Brunswick Railroad Company, the first mortgage having been previously foreclosed by a sale of the property of the

company to the State, then, at the time of the suit, holding it in possession by its agent. The remedy sought was "to set aside the sale to the State, to be let in as prior in lien, and for other relief affecting the property." The bill assailed the validity of the sale.

The decision is embraced in a brief compass, page 457: "In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued had any personal interest in the matter or any official authority to grant the relief asked.

"No foreclosure suit can be sustained without the State, because she has the legal right to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the Court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession. On the hypothesis that the foreclosure by the Governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued."

It will be observed that the question as to the validity of the sale and the title of the property was assumed; the opinion going upon the hypothesis that the title was valid. The bill had been dismissed by the Circuit Court upon demurrer.

In the case now before the Court, the facts are almost identical. The deed under which plaintiff claimed title was assailed by the defendants below, thus creating an issue which the Court below held to be irrelevant. And now, conversely, before this Court can sustain the jurisdiction, your Honors must assume, by way of hypothesis, that this deed was valid. In Cunningham's case the issue went off on demurrer; whereas in our case it went upon verdict, *defendants below being denied a hearing on the crucial issue in the cause.* So that this Court is not informed where the right of the controversy rests—whether the deed in controversy is valid or void.

Here, too, Justices Harlan and Field dissent, upon the argument of their dissenting opinion in *Louisiana* v. *Jumel*, adhering to the authority of *Osborn's* and *Lee's* cases. The case is too long to be here treated exhaustively. The Court will refer to it.

We have only to point to the fact that the principles of these cases of Osborn and Lee are, to say the least, denied operation. In *Jumel's* case, as well as in Cunningham's, an examination of the record will show that the respective States had grossly violated the provision of the Constitution of the United States in reference to violations of the obligation of contract; and if we construe the provisions of this Constitution in *pari materia*, we might be forced to the conclusion reached first in *Osborn's* case. This Court will consider whether it is not now too late to apply to the case in hand the principles of Osborn's case, as reaffirmed in *U. S.* v. *Lee*.

Now, let us recur to the doctrine of these cases. It is said: "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is sufficient reason for the omission to do it, and the Court will proceed to decree against the officers of the State in all respects as if the State were a party to the record. * * * Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as a real party in interest."

We will not pause to compare this with the rulings in the *Jumel* and *Cunningham* cases; only to say that our case is based practically on the same state of facts.

In view of these later cases, we might be bold enough to comment upon the principles announced in the former cases. The logic has been beyond our understanding. In order to ascertain whether the Court has jurisdiction, it must take jurisdiction, and examine into the title. If title be found in the plaintiff in the action below against the State, then the U. S. Court has jurisdiction. If title be found to be in the State, then the Court has not jurisdiction and never had. It depends, then, upon the right and wrong of it as it may appear upon trial on the merits. If the State is right in her claim, then the case is not within the jurisdiction. If the State has done wrong, jurisdiction must be taken, to the end that the right of the litigant be maintained. All this in the face of the imperious mandate of the Eleventh Amendment. And in applying it to the case now before the Court, this doctrine must be enforced, *while in the Court below the State is denied the privilege of showing that the deed under which defendant in error claims title is fraudulent and void.*

Hagood v. *Southern* and *Hagood* v. *Williams*, *supra*, were heard together Both were suits brought in the Circuit Court for South Carolina, to enforce the obligation of the contract between defendants in error and the State, evidenced by this same "Revenue Bond Scrip." The case now before the Court is a fourth attempt to acquire jurisdiction of this question in the United States Court: to which should be added the case of *The State ex relatione Shiver* v. *Comptroller-General*, in the Supreme Court of the State. In all of these cases the interest of the defendant in error here may be traced; his active participation is part of the record of Hagood's case. This is the syllabus:

"When a suit is brought in a Court of the United States against officers of a State to enforce performance of a contract made by the State, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the State, and the nominal defendants have no interest in the subject matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought, and the suit is substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States. *Louisiana* v. *Jumel*, 107 U. S., 711, affirmed and applied."

From the opinion in *Hagood* v. *Southern*, we quote (117 U. S., 52). The application to our case is more obvious than is the opinion in the Jumel case:

"The controversy," says Mr. Justice Matthews, page 67, "in which the validity and obligation of the scrip are involved is the subject of the present suits. The complainants as holders of this scrip, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it

chooses; and, except with that consent, it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the 'judicial power of the United States shall not be construed to 'extend to any suit in law or equity commenced or prosecuted 'against one of the United States by citizens of another State, 'or by citizens or subjects of any foreign State.'"

Then on page 71, the Court say, concluding the opinion:

"The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent. And the Court cannot proceed to the determination of a cause and controversy, to which the State is an indispensable party, without its presence. This, however, the Circuit Court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the Court against the State through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

It is submitted that this case controls the case now before the Court. Whatever be the form of the action, the fact remains that the decision of this Court against plaintiffs in error must be enforced by a judgment against the property in controversy, in the possession of the State, through its officers, in a suit to which it is not a party. This is in effect placing the strong hand of the Court upon the State itself.

"*In re Ayers*," 123 U. S., 443, is an elaborately considered case, in the same line. It is only permitted to quote part of the syllabus; after referring the Court to pages 501–503:

"Whether a State is the actual defendant in a suit within the meaning of the Eleventh Amendment to the Constitution of the United States is to be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record. *Osborn* v. *Bank of the United States*, 9 Wheat., 738, 857, explained and limited.

"In order to secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment, it should be interpreted not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover, not only suits brought against a State by name, but those against its officers, and representatives, where the State, though not named, is the real party against which the relief is asked and the judgment will operate."

"If a bill in equity be brought against the agents and officers of a State, the nominal defendants having no personal interest in the subject matter of the suit, and defending only as representing the State, and the relief prayed for is a decree that the defendants may be ordered to do and perform certain acts which, when done, will constitute an alleged performance of an alleged contract of the State, it is a suit against the State for a specific performance of the contract within the terms of the Eleventh Amendment to the Constitution, although the State may not be named as a defendant; and, conversely, a bill for an injunction against such officers and agents, to restrain and enjoin them from acts which it is alleged they threaten to do, in pursuance of a Statute of the State, in its name, and for its use, and which if done would constitute a breach on the part of the State of an alleged contract between it and the complainants, is in like manner a suit against the State within the meaning of that Amendment, although the State may not be named as a party defendant."

In *Poindexter* v. *Greenhow*, 114 U. S., 270., 293, Mr. Justice Matthews formulated a brief summary of six tests, which have been judicially suggested for determining when a suit should be considered to be a suit against the State. Among them, (as applicable to our case,) are: 2. Where the action is brought

directly upon the State's contract; 5, where the action is brought to compel officers of the State to do acts which constitute a performance of its contract by the State. In every material aspect, the case before the Court falls under both of these tests.

But the conclusive test is that found in *Cunningham* v. *Macon and Brunswick R. R. Co.*, *supra*, which may be formulated thus: "The State will determine the rights of parties to suits as to property of the State, or property in which the State has an interest, *so long as it is not necessary to take property forcibly from the possession of the State*."

In discussing this motion to affirm, it devolved upon plaintiff in error to show that the question is not so frivolous as to bring our case within the rule. On the contrary, we respectfully submit, we have shown that the judgment below will not be affirmed either under the motion, or upon a hearing on the merits. The cases since *Osborn* v. *Bank*, *Davis* v. *Gray* and *U. S.* v. *Lee*, take our case clearly out of the operation of the principles as therein determined, and relied on wholly in support of the motion.

We submit that paragraph 5 of Rule 6 was not intended to apply to a case of this exceptional character. To affirm the judgment below, would be, by summary proceeding, to forestall the decision of the Circuit Court of Appeals in the cause now pending in that Court, already heard upon the merits and awaiting determination, upon the main question of jurisdiction here mooted.

Sam'l. W. Melton.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 96.

J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

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AGREEMENT OF COUNSEL.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

We, the undersigned attorneys, representing the plaintiff and the defendants in this action, hereby agree that the following shall constitute the printed record and return in the above entitled cause, on the appeal to the Circuit Court of Appeals, sitting at Richmond, Virginia:

1. The Style of the Court and Title of the Cause.

2. The Summons.

3. The Complaint and Answers.

4. The Verdict and the Judgment entered thereon.

5. The Order Extending the Time to File the Bill of Exceptions.

6. The Bill of Exceptions.

7. The Assignment of Errors and Petition for Writ of Error.

8. The Bond.

9. The Writ of Error.

10. The Citation.

11. The Testimony.

12. The Certificate of the Clerk.

The part of the testimony to be printed in the record is the testimony of the witnesses, W. H. Lyles and Dr. W. T. C. Bates: and the testimony of the defendant, J. E. Tindal. The appeal from the order refusing the motion for a non-suit being waived.

16th JULY, 1894.

MELTON & MELTON,
Attorneys for Defendants.
LYLES & MULLER,
Plaintiff's Attorneys.

Filed 16th July, 1894.

TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.
} *To wit: At Law.*

At a Circuit Court of the United States for the Fourth Circuit, in and for the District aforesaid, on the first Monday in April, 1894, before the Hon. Charles H. Simonton, Circuit Judge of the United States for the Fourth Judicial Circuit, holding said Circuit Court according to the form of the Act of Congress in such cases made and provided, the following proceedings were had: 6

EDWARD B. WESLEY, *Plaintiff*,
vs.
J. E. TINDAL AND J. R. BOYLES, *Defendants*.

Be it remembered that heretofore, to wit, on the 13th day of February, A. D. 1893, the said Edward B. Wesley, by his attorneys, Messrs. Lyles & Muller, came into Court and filed the following complaint, which complaint is in the words and tenor following: 7

COMPLAINT.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,
vs. 8
J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

The plaintiff above named, complaining of the defendant herein, alleges:

1. That the plaintiff is, and at the times hereinafter mentioned was, a citizen of the State of New York, and that the defendants are, and at the times hereinafter mentioned were, citizens of the State of South Carolina.

2. That on the 16th day of February, 1892, the plaintiff pur-
9 chased from the Commissioners of the Sinking Fund of the State of South Carolina the following described premises, situate in the city of Columbia, County of Richland and State of South Carolina, to wit, all that lot, piece or parcel of land situate in the city of Columbia, containing one-quarter of an acre, more or less, with the buildings and improvements thereon known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the North by land now or late of the estate of McAndrew, on the East by Richardson street, and on the South and West by lands now or formerly of Jacob C. Lyons; said lot
10 of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, Sheriff of Richland County, by deed dated the 3d day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 196 and 197; also *all* that certain parcel or lot of land situate, lying and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded North by the Agricultural Hall building and lot immediately in rear thereof, East by Richardson street, South by lot now or formerly of Jacob C. Lyons, and West by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker, said lot
11 being a rectangular parallelogram in shape, and measuring on Richardson street, from the Southeastern corner of the said Parker Block building, South twenty-six feet, and from East to West two hundred and eight feet, the said lot also joining a part of the Agricultural Hall Block, and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1875, and recorded in R. M. Conveyance office for Richland County, in Book K of Deeds, pp. 319 and 320, the above described two lots of land being the same conveyed to the State of South Carolina
12 by deed of J. B. Johnston, dated April 9th, 1883, and recorded in R. M. Conveyance office in Book P of Deeds, &c., p. 87; and said premises are worth, and at the times hereinafter mentioned were worth, at least, sixteen thousand one hundred and sixty-five dollars; which said premises were the said day, by the direction and appointment of the plaintiff, conveyed by the said Commissioners of the Sinking Fund to J. W. Alexander, to hold the same in trust for the use of the plaintiff, his heirs and assigns, forever, and to permit the plaintiff to have and possess the same, and to enjoy the profits, and in trust to convey the

same to the plaintiff, his heirs and assigns, or such person as he 13
might direct and appoint: that upon the request of the plaintiff, the said J. W. Alexander, by deed dated the 11th day of February, 1893, conveyed the said premises in fee simple to this plaintiff.

3. That the plaintiff being so possessed thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff; and that the defendants are, and ever since the said 20th day of February, 1892, have been, in possession of said premises, and have been and still are withholding the same from the plaintiff, although plaintiff 14
has demanded from the defendants the possession thereof, to the damage of the plaintiff ten thousand dollars.

4. That the value of the use and occupation of said premises is at least twenty-five hundred dollars per annum.

Wherefore, the plaintiff demands judgment against the defendants:

1. For the possession of said premises.

2. For ten thousand dollars, the plaintiff's damage by the withholding of the same.

3. For the value of the use and occupation of said premises 15
since the 20th day of February, 1892, at the rate of twenty-five hundred dollars per annum.

4. For the costs and disbursements of this action.

LYLES & MULLER.
Plaintiff's Attorneys.

FEBRUARY 13th, 1893.
Filed 13th February, 1893.

SUMMONS.

16

UNITED STATES OF AMERICA.
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT.
FOURTH CIRCUIT.

EDWARD W. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

To J. E. TINDAL *and* J. R. BOYLES, *Defendants in this Action:*

You are hereby summoned and required to answer the com-

plaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at their office, No. 18 Law Range, Columbia, S. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., this thirteenth day of February, Anno Domini one thousand eight hundred and ninety-three, and in the 117th year of the Sovereignty and Independence of the United States of America.

J. E. HAGOOD,
[SEAL.] C. C. C. U. S. Dist., S. C.

LYLES & MULLER,
Plaintiff's Attorneys.

Filed 13th February, 1893.

AFFIDAVIT OF SERVICE.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
FOURTH CIRCUIT.

EDWARD B. WESLEY,
vs.
J. E. TINDAL AND J. R. BOYLES.

John A. Barre, being duly sworn, says that he served the summons and complaint in this action on the defendants by delivering to them personally and leaving with them copies of the same, at their residences, on the 13th day of February, A. D. 1893, and that he knows the persons so served to be the ones mentioned and described in the summons as J. E. Tindal and J. R. Boyles, the defendants therein; and the deponent is not a party to the action.

JOHN A. BARRE.

Sworn to before me this 13th day of February, 1893.

[SEAL.] ROBT. W. SHAND,
Notary Public for South Carolina.

Filed 13th February, 1893.

ANSWER OF J. E. TINDAL.

21

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT, FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

22

The defendant, J. E. Tindal, above named, answering the complaint herein, says:

FOR A FIRST DEFENSE.

That this defendant denies each and every allegation in the said complaint contained.

FOR A SECOND DEFENSE.

First. Further answering, this defendant, for a second defense, says that on the 20th day of February, A. D. 1892, des- 23
ignated in the said complaint, this defendant was, and has since continued to be, and now is, the Secretary of State of the said State of South Carolina; that the premises described in the said complaint on the said day were, and have since continued to be, and now are, the property and in the possession of the said State, and in actual public use.

Second. That this defendant has no right, title, interest or estate to or in the said premises of any kind whatever, but that in pursuance of law the same is in the custody of this defendant, as said Secretary of State.

24

MELTON & MELTON,
Attorneys for Defendant, J. E. Tindal.

COLUMBIA, S. C., 6th March, 1893.

Service of a copy of the within answer of J. E. Tindal accepted this day.

LYLES & MULLER,
Plaintiffs Attorneys.

Filed 7th March, 1893.

25 **ANSWER OF J. R. BOYLES.**

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT, FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

26 The defendant, J. R Boyles, above named, answering the complaint herein, says:

FOR A FIRST DEFENSE.

That this defendant denies each and every allegation in the said complaint contained.

FOR A SECOND DEFENSE.

First. Further answering, this defendant, for a second defense, says that on the 20th day of February, A. D. 1892, designated
27 in the said complaint, J. E. Tindal, co-defendant herein, was, and has since continued to be, and now is, the Secretary of State of the said State of South Carolina.

Second. That the said premises are the property of the State of South Carolina; and on the said day and since have been and now are in the possession of the said State and in actual public use.

Third. That this defendant has no right, title, interest or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal as Secretary of State, this
28 defendant has been and now is engaged, on behalf of the said State, in watching, guarding and taking care of the said premises.

MELTON & MELTON,
Attorneys for Defendant, J. R. Boyles.

COLUMBIA, S. C., 6th March, 1893.

Service of a copy of the within answer of J. R. Boyles accepted this day.

LYLES & MULLER,
Plaintiffs' Attorneys.

Filed 7th March, 1893.

TESTIMONY.

29

W. H. LYLES, sworn:

Direct Examination by Mr. Muller.

Q. You are a practicing attorney in Columbia? A. I am.

Q. State to the jury what connection you had with the purchase of this Hall property—who you represented? A. I was employed by Mr. Wesley, a resident and citizen of the State of New York, to make the purchase. He arranged for the purchase to be made in the name of J. D. Alexander, of North Carolina, 30
as trustee for him, and I, after seeing the advertisement of the property—the sale was advertised to take place on salesday, in February, 1892, in the city of Columbia, before the Court House door, at public auction—I attended this sale, and bid in this property. It was offered at public auction, David Means, the clerk or agent—

Mr. Melton asks that the witness be cautioned to speak only what he knows.

Q. What position does Mr. Means hold? A. I have had nu- 31
merous transactions with the Secretary of State, which were conducted by Mr. David Means, who occupies some official position in the office, the office of the Secretary of State, in the State House, in the city of Columbia. Mr. Means was present at this sale, and after some consultation with him as to the terms, etc., the property having been put up, I bid it in, in my own name, as attorney, for $16,135, something over $15,000, which I considered the value of the property, knowing the value of real estate in Columbia to be about $18,000 to $20,000, and I think the property is worth now and at the time this action was brought 32
as it was worth then. I bid in the property, and the paper was prepared: the deed, bond and mortgage were prepared in the Secretary of State's office, and brought to me by Mr. Means.

Q. Where did you get the deed from? A. I had gotten the deed at that time: the bond and mortgage had been prepared in the office of the Secretary of State, and were brought to me for execution. I forwarded—

Q. You say they were sent or brought to you by Mr. Means? A. The bond and mortgage, prepared for execution, were brought to me by Mr. Means; they bore date the day of sale; I forwarded

them to Mr. Alexander, with instructions as to how they were to be executed; they came back to me properly executed, with the exception that the date had been changed so as to conform to the date of the actual execution of the bond and mortgage. I took them to the Secretary of State's office, and conferred with Mr. Means about the matter, and my recollection of the matter is that with Mr. Tindal, the Secretary of State, Mr. Means and I together went into the Attorney General's office, McLaurin at that time being Attorney General, and Mr. Townsend acting as assistant. We submitted the papers to Mr. Townsend, calling attention to the alteration, and he objected to taking the paper in that form on account of the alteration of the date, it being the bond and money for the purchase money, and it should bear date of the deed, and Mr. Means gave me, from the Secretary of State's office, a form of bond and mortgage. I have not seen those papers since that day, and my recollection is not positive on the subject, but my recollection is the new bond and mortgage was prepared by me, we leaving the old bonds and mortgage in the hands of the Attorney-General, he suggesting some alterations, writing the alterations on the papers themselves. Those papers have been destroyed. The new bond and mortgage were sent on to Mr. Alexander, and were properly executed by him, and when they were executed, I went down to notify Mr. Means that we were ready to comply with the terms of sale, paying over the cash portion of the purchase money, and delivering the bond and mortgage that were submitted to him; then he went with me to the building itself; we went through it, examined it, and some conversation occurred between him and the occupants of the building, and then having been joined by Mr. Jacob S. Muller, we went into the State Treasurer's office; I had the day *before* asked Mr. Means if a certified check on the Columbia National Bank of Columbia would—

Mr. Melton objects, as the agency of Mr. Means is not admitted.

We found Mr. Bates there; he said something about the form of bonds and mortgage; Means and I told him that the bond and mortgage had been drawn up with the exact instructions of the Attorney-General. I then produced a certified check for one-third of the purchase money; asked Dr. Bates if he would as leave have that as cash, the money had been deposited the day before in the shape of exchange in the Columbia Bank, and was

there subject to the payment of the check, and Dr. Bates said he 37
would prefer it to the cash in hand. I gave the certified check to him and the bond and mortgage, and he formally delivered the deed to us. This mortgage provided for the insurance of the property in policies to be assigned to the State. I called their attention to the fact. Mr. Means then, in Dr. Bates' presence, stated the fact that there were policies of insurance then then upon the property, and if it suited our purpose as well, he would have those policies assigned: he then went out of the office for the purpose of calculating the unearned portion of the premium, I agreeing to pay up the unearned portion of the pre- 38
mium: he came back in a few minutes; I am—

Mr. Melton objects.

I then sat down to the desk of the State Treasurer, and started to write the check to the State Treasurer for the amount of the unearned insurance. Mr. Means then said to me that it was not to be paid to the State Treasurer, that it had to go into the Sinking Fund Commission. I turned to Dr. Bates, and he assented to the fact, and I directed the check either payable to Mr. Means or to the Sinking Fund Commission. Mr. Means in the meantime prepared, on the the delivery of the deed, an order 39
for the possession. Those papers, which I now identify, in the presence of the State Treasurer, accompanied the deed, which was formerly delivered by Dr. Bates. We took, Mr. Muller and I took, the receipt executed in duplicate by Dr. Bates and these orders and walked out of the office.

Mr. Muller now *formally* offers the order in evidence.

Mr. Melton says he has no doubt of the handwriting, but denies the agency of Mr. Means, denies the agency of the Secretary of State, and the agency of the Treasurer of State.

Mr. Muller reads the order to the jury and the receipt of Mr. 40
J. W. Alexander.

Q. You say the deed was formally delivered to you by Dr. Bates?. A. Yes.

Q. After obtaining the deed what did you do? A. We went out of the office.

Q. Did you demand possession of the property at that time? A. No; we went out of the office.

Q. At what time did you make the demand of the defendants for the possession of the property? A. We made demand on the day of the service of the summons and complaint in this action.

41 13 February, 1893, having prepared the papers: the former action had been commenced and discontinued, and having prepared the papers for this action I went to the building and found there the defendant, J. R. Boyles, in possession, and I told him that we were about to commence an action for the possession of the property, and demanded possession, in the name of Mr. Wesley, stating to him that Mr. Alexander had conveyed the property to Mr. Wesley, and offered to exhibit the deed. He told me that it was no use to show him the deed, he had instructions from the Secretary of State, Mr. Tindal, to refuse
42 possession, and he would not deliver the possession. I went immediately to Mr. Tindal's office, and found him there, and told him in substance what I had told Mr. Boyles, and stated that Mr. Boyles had refused to deliver the possession of the building or the grounds; that he had ordered him to hold the possession, and Mr. Tindal assented to that, and then I made a formal demand of him; he refused to deliver possession, and said he was required to hold it for the Sinking Fund Commission. We had some further conversation about the matter, and he said he was holding it as Secretary of State, and as such would refuse
43 to deliver the possession.

Q. Do you know what position Mr. Means held in the Secretary of State Office? A. I have never seen his appointment; I have only known as a matter of public notoriety.

Q. What connection had he with the Sinking Fund Commission? A. This I know: He always transacted the business for the Sinking Fund with reference to the real estate in its hands as the property of the State.

Q. Who was the Secretary and Treasurer of the Sinking Fund Commission? A. I have had repeated transactions with Mr.
44 Means through the Sinking Fund Commission for forfeited lands. I have had transactions with respect to the Sinking Fund Commission before Mr. Means and Mr. Tindal.

Q. In whose handwriting is the deed from Alexander to the Sinking Fund Commission? A. In the handwriting of D. H. Means who was one of the witnesses to the deed.

Q. I understood you to say that Treasurer Bates was present when Mr. Means handed you these orders for the possession of this property? A. Yes.

Q. Who handed you the deed itself? A. Dr. Bates; Means had turned it over to him.

Q. And to whom did you give the bond and mortgage? A. 45
To Dr. Bates who gave us the receipt for the money; Dr. Bates is the State Treasurer for the State of South Carolina.

Cross-Examination by Mr. Melton.

Q. You have stated that the deed *was formally* delivered to you, what do you mean by that? A. That it was handed over to me.

Q. By whom? A. By Dr. Bates.

Q. And received by you? A. Yes.

Q. Please state precisely what occurred, *formally* delivered is 46
a conclusion of law: state what occurred, go over it? A. After Mr. Means and I had been in the Agricultural Building we were joined by Mr. J. S. Muller, a brother of Mr. Muller here.

Q. He was concerned with you in the transaction? A. Yes, at the time associated with me. We went into the Secretary of State's office; the day before I had notified them we were ready on that day to settle, and produced the bonds and mortgage, and after some delay in the Secretary of State's office, while Means was writing out those orders for possession, we went with him into the office of the State Treasurer, who turned over the deed 47
to Dr. Bates, and then we had the conversation which I have related as to the bond and mortgage. Dr. Bates stated at the time something about the form of the bond and mortgage; I told him they had been drawn in exact conformity to the bond and mortgage which had been prepared by the Attorney-General.

Q. Did you know at the time you bid the property off for whom you were acting? A. I did.

Q. Did you give the name? A. No, because Mr. Wesley had reasons; he stated to us why he would prefer it to be brought in the name of the same trustee for himself.

Q. When did you give the name? A. I gave it the day when 48
I got back the first bond and mortgage from Mr. Alexander which had been executed by him.

Q. Did you happen to know at the time the deed was executed by the Commissioners of the Sinking Fund that the name was not there? A. Yes, I did.

Q. Who filled in the names? A. I don't know.

Q. Was it not filled in in your presence? A. I think not; I can tell you in a moment. I think it was filled in by Mr. Means. [Refers to the deed.] Yes, it was filled in by Means, the writing is his.

49 Q. Were you not in the office of the Secretary of State and in his presence when the name was filled in, when you gave the name? A. I am inclined to think that I was present; I have been thinking over the matter, but I am not positive.

Q. You do know it was signed by these gentlemen whose names are here without the name of the grantee? A. Yes, when I first saw that deed it was signed by those gentlemen.

Q. With the name blank? A. Yes, it was then in the hands of the Secretary of State with the name of the grantee blank.

Q. And the name of the grantee was put in by whom? A. I
50 would not be positive; I saw Mr. Means do it; I know it was put in by him; it was between my interview when I received the bond from Mr. Alexander and the day of its return to me as attorney for Wesley; my impression is that it was filled in the day of my first interview by Mr. Means.

Q. Do you happen to know that when Means filled it in that the Secretary of State was there? A. My impression is the Secretary of State was there the first interview.

Q. That was not the time of the delivery of the deed? A. No, a week intervened; I had gone off from the city; it required
51 a time to send the new paper up to Lincolnton, N. C., to be executed by Alexander and returned. They came to me two days before they were delivered; I was called away; I received a note from the Secretary of State to have the matter closed up. I saw Mr. Means; told him I would be back the next day and would see him about it, and the next day I saw him and made an appointment for the day following.

Q. When you were there and had the transaction to which they have testified, was the Secretary of State there—the delivery of deed you are speaking of? A. Yes; the deed was deliv-
52 ered in the State Treasurer's office. The Secretary of State was not there.

Q. He was not in Columbia? A. I believe he was not.

Q. You did not know him in the transaction? A. Yes; I knew him all through the transaction. I had repeated conferences with him in Mr. Means's presence about the matter.

Q. Was he there in Columbia at his office or anywhere in Columbia at all the day the transaction was completed? A. My impression is he was not in the city; but I would not say so positively.

Q. Did you know in the meantime where the deed was? A. 53
I only know every time I saw it it was in the Secretary of State's office.

Q. Locked up in the safe? A. I don't know.

Q. Where did Mr. Means get the deed? A. I don't know.

Q. You spoke of Mr. Wesley as a citizen of the State of New York? A. I have known him for a long time, and only know it in the way I know that you are a citizen of the State of South Carolina.

Q. Is it not true that a good many do business in New York and live in the States of New Jersey and Connecticut? A. Yes. 54

Q. Do you know anything to the contrary that he may so have lived? A. I only know from my knowledge of the fact, which is gained by a personal knowledge of the man, that he is a citizen of the State of New York.

Q. Do you know anything more then when you are in New York you see him there? A. Yes; I know more than that. I have seen him there, and he is a *well* known man; and I only know from my own general connection with him and general knowledge.

Q. That is all? A. Yes; I have never seen him vote. 55

Q. And so far as you know he may be a citizen of the State of New Jersey? A. So far as I know he is a citizen of the State of New York.

Q. But you don't know that? A. I—I—know it to the extent that I know any fact—

Q. That you don't know? A. Because I have knowledge of the existence of facts that can only be proven, not by ocular demonstration but by general reputation and knowledge, as I know that you are a citizen of Columbia.

Q. You know me mighty well? A. Yes; and yet I never saw 56
you exercise any of the acts of a citizen.

Q. Nor have you ever seen him? A. No.

Q. And you can't swear whether he is a citizen of New Jersey *or* New York? A. No, I cannot, except from the knowledge that I have of him.

Q. You say you took the deed and went out of the office? A. Yes.

Q. You came back almost immediately? A. Came back within the space of three or four minutes.

57 Q. *What* then took place? I want to know what occurred between you and Mr. Muller on the one hand, and Dr. Bates on the other, when you went out of the room and immediately returned?

Mr. Muller objects and argues his point before the court.

The Court directs the jury to withdraw.

Q. You and Mr. Muller went out of the State Treasurer's office and almost immediately returned: now, what occurred between the State Treasurer on the one hand and Mr. Muller and yourself on the other? A. We returned within five minutes—I
58 think within two minutes. We called the State Treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate it at any time: and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script, known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date up to the date of this transaction, and we told Dr.
59 Bates we tendered him that in payment of the bond and mortgage: we demanded no receipt: we demanded nothing.

Q. And it was refused? A. Yes; the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in the U. S. Circuit Court in order to test the *calidity* of the revenue bond script—was not that the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script, but as to the United States Circuit Court we were not—

60 Q. Then, when you brought it you did not intend to pay for it in good money? A. We did; and considered the script as good money.

Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment of it in revenue bond script? A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market? A. I don't know.

Q. It has not? A. I don't know that it has.

Q. Very little, if any? A. Yes.

Q. You know Alexander? A. Yes; I have never seen him personally.

Q. You know him as a poor man? A. Yes. 61

Q. Had he and Mr. Wesley had no use for this property that you know of, except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond script? A. Yes.

By the Court:

Q. The transaction of the sale had been completed? A. Yes, 62
we had taken the formal delivery of the deed, and had delivered the bond and mortgage and taken the receipt, put it in our pocket and went out of the room, then came back and told Dr. Bates that we had the privilege of anticipating the payment—

Q. And you exercised that privilege under the bond, and not under the terms of the sale? A. Yes, and we called his attention to the fact that it provided for our right to force the payment.

Judge Simonton rules the testimony out so far as Mr. Lyles is concerned.

63

Jury returns.

Mr. Muller offers in evidence the certified copy of the minutes of the Sinking Fund Commissioners.

Objected to by Mr. Melton.

The Court rules that that is not the best evidence, and that the certified copy cannot be admitted, objections being sustained and exceptions noted.

Mr. Muller offers in evidence the mortgage recorded in the R. M. C. O., of Richland County, 11th March, 1892.

64

It is admitted by defendants' counsel that Mr. Wesley is a citizen of New York.

It is admitted that Mr. Tindal and Mr. Boyles are citizens of the State of South Carolina.

MR LYLES *recalled by Mr. Muller:*

Q. State again the conversation you had with Mr. Tindal. A. On the day this action was commenced, before we put the papers in the hands of the Deputy Marshal for service, I went down to the building itself. I found Mr. Boyle, the defendant,

65 in possession of the building, and I told him I had come down to demand possession of the building. He told me he was there in the custody of the building, under the instructions of the Secretary of State, and that he was instructed not to give up the possession of the building to me, and I would have to see the Secretary of State. I went immediately to his office, having had some trouble in the first case about the matter, and I told him of my conversation and Mr. Boyle's statement to me that he was holding the property under the instructions of the Secretary of State. He said he had stated the matter correctly:
66 that he was instructed by the Commissioners of the Sinking Fund to hold that property as the property of the State of South Carolina, and he couldn't give the possession of the property to me, that he held it as agent of the Board of the Sinking Fund Commissioners for the State of South Carolina.

Cross-Examination by Mr. Melton.

Q. Did you make any demand on any of the tenants of the buildings? A. I could not go into the building.

Q. That is not the question. Did you make any of Mr.
67 Bowden? A. No.

Q. Nor of any one else? A. Of no one except Mr. Boyles, who I found at the front door of the building. He told me he had instructions to guard the building.

Plaintiffs rests here.

Mr. Melton enters a motion for a non-suit, which is argued before Judge Simonton.

The Court rules as follows:

The object and purpose of this suit is the obtaining possession of a certain tract of land in the city of Columbia. The plaintiff
68 not being actually in possession of the land, is obliged to show that he has in himself such titles as warrants a possession. For that purpose he has introduced testimony that he holds title under the State, and in the same testimony he offers evidence that his demand under that title was refused upon the ground that the parties were holding by virtue of the State, both parties referring their claim to the same source, and the motion for non-suit is overruled.

The defendants read the depositions of George K. Wright, 69
Capt. Samuel W. Bowan, D. Gambrill, N. W. Campbell.

TESTIMONY.

JAMES E. TINDAL, sworn:

Direct Examination by Mr. Melton.

Q. You are Secretary of the State? A. Yes.

Q. Have you any connection with the Commissioners of the Sinking Fund? A. Yes. I am agent of the Sinking Fund.

Q. To what purpose? A. As to certain forfeited lands, va- 70
cant lands, and also as to the abandoned lands indirectly.

Q. Are you agent for lands which are not rented, or lands in possession belonging to the State outside of the jurisdiction of the Commissioners of the Sinking Fund?

Question objected to.

Q. Have you taken posession of the lands which under the General Statutes are placed in your custody? A. I have.

Q. Was the Agricultural Hall Building one of those buildings in your possession? A. Yes: in 1890, after the Act was passed transferring this property to the Agricultural College and authorizing its sale, when Mr. Butler moved out, I took it in charge 71
and custody, as I did also the Government Mansion and all other like property.

Q. What was the nature of your posession: did you live on the place? A. No. I simply took charge of it to preserve it.

Q. What did you do with the property when you had it in possession? A. I took charge of it, put a guard there and tried to rent out portions of it, and used the money to repair the building with, protecting the roof, etc.

Q. Whose money did you use in the repairs? A. We gener- 72
ally obtain some money for renting portions of it out, and used the money so obtained.

Q. Was it your own individual money? A. No.

Q. Have you any interest in that building or lot upon which it is placed? A. Not individually.

Q. Have you ever claimed any interest in it? A. No.

Q. What position does Mr. Boyles, your co-defendant, what position has he in reference to that building? A. He is the guard there. I employed him to guard and protect the building, as I did guard at the State House and the Governor's Mansion, when the Governor is not there.

73 Q. What do you call him? A. He is watchman.

Q. Does he live on the place? A. No.

Q. Was there any one, at the time of the alleged deed to Alexander, was there any body in that building at that time? A. Yes.

Q. Who was there? A. The Railroad Commissioners had their rooms there, and I had engaged two rooms to Mr. Bowden, editor of a paper, for which he paid $2.00 a month each, and the Weather Bureau had their office in the building; I found them there when the building came into my posession, and I did
74 not remove them; they are there yet.

Q. Since that time how is that building used? A. Those same parties I have mentioned are there, and a little later on the Dispensary was established in that building; I think that was some time in the Spring of last year. Mr. Traxler, who is the State Dispenser, has his office there, and the liquors belonging to the State.

Q. Do you know David H. Means? A. I do.

Q. Do you know who he is employed by? A. Me.

Q. How long has he been in your employment? A. Since I
75 have been Secretary of State.

Q. When was that? A. 1890.

Q. What are his duties in reference to his employment by you? A. I have distinct duties as Secretary of State and Agent of the Sinking Fund; he is my chief clerk as agent of the Sinking Fund and bookkeeper, and, in addition, the moneys coming into the office are deposited in the bank by him; he keeps all the money accounts; he is the chief clerk and bookkeeper of the Agent of the Sinking Fund.

Q. What do you do as Agent of the Sinking Fund? A. A
76 good many duties; all the lands that are forfeited to the State we endeavor to collect the taxes on, and we rent out the vacant lands, and collect the rents, and as Agent of the Sinking Fund we send a man and take possession of those lands under the new law.

Q. I understand you, therefore, to say that you are only the custodian of the Agricultural Hall, and you have never been actually in possession thereof; you have never lived on the place? A. No.

Q. Do you remember the time of the alleged sale to J. W. Alexander of the Agricultural Hall? A. I recollect when the

hall was sold, but it was not to him directly at that time, it was 77
only afterwards his name came in.

Q. State your connection, if any, with that sale to J. W. Alexander? A. A law was passed by the Legislature at that time authorizing the sale of this building by the Commissioners of the Sinking Fund, the money to go to Clemson College. I was trustee of that College, and much interested in it. The Commissioners of the Sinking Fund held a meeting and discussed the matter of the sale of the hall, and at first they decided—

Q. Who called that meeting? Just after the Legislature ad- 78
journed or passed this Act the Board of the Commissioners of the Sinking Fund were together, and discussed this matter as to whether it should be sold, but not until it should bring $20,000.

Objected to.

In consequence of that meeting the hall was advertised; I think it was in October, 1891, but it did not bring a bid sufficient to justify a sale, and therefore it was bid back by the State officers. The next year it was advertised in January, and put up and sold on the first of February, but at that time it had been agreed that the bid of $20,000 should be withdrawn, and a bid of 79
$16,000, as much as we could get, and as soon as a purchaser could be found who would give that, it would be advertised again in January to be sold in February. The sale took place on the first of February.

Q. Who conducted that sale? A. I sent Mr. Means, the chief clerk, down there to conduct the sale, and I also went down myself, and got there a little after the advertisement was read, and while the bidding was going on I was present, but Mr. Means conducted the sale under my orders.

Q. Were any of the Commissioners of the Sinking Fund pres- 80
ent at that sale? A. Not one.

Q. Who appointed the day upon which the sale should be made? A. I appointed it.

Q. Who gave the advertisement to the papers? A. I did, or had the advertisement written out, and gave it to Mr. Means, the chief clerk.

By the Court:

Q. You advertised that property for sale in October, and you withdrew it, and you advertised it again in January, and then sold it? A. Yes.

81 Q. And you were present, although Mr. Means, your clerk, was conducting the sale? A. Yes.

By Mr. Melton:

Q. In what capacity did you make the first advertisement and the second, and watch the conduct of the sale? A. In this way: The Board had an informal, agreeing to sell, and authorized me to put up the building and sell if I could get $20,000; afterwards they found that bid was higher than the property would bring, and as the College was in need of the money, they placed it at
82 $16,000, which Mr. Duncan agreed to give for it. We had the property advertised in January, the Sinking Fund Commissioners had an informal meeting in the Governor's office, and they authorized me to sell it.

Q. You speak of an informal meeting? A. The regular meetings of the Board were once a month in my office, as Secretary of the State, but all the members of the Board were not in the city, and it was deemed advisable to have this property advertised. I asked the members of the Board present in the city, the majority of the Board, to meet in the Governor's office, and
83 sanction my sale of the building; it was not at a regular meeting of the Board.

Q. Is it not a rule that notice is to be sent out whenever a meeting of the Board is to be called?

Objected to; objection overruled.

A. Yes, the rule is this, that I sent out or required the clerk to notify each member of the Board when the regular meeting takes place; maybe it is necessary to postpone that meeting a week, or perhaps it may not be a week, but they are always
84 notified.

Q. Were they notified of this meeting? A. Only in the informal way I have stated.

Q. Some were not in Columbia at the time? A. No.

Q. Were they notified there was to be a meeting? A. No; the Chairman of the Ways and Means Committee of the House and the Chairman of the Ways and Means Committee of the Senate did not live in the city.

Q. Had Mr. Means any official connection with the sale of the Agricultural Hall? A. No; simply at our request; I sent him down to conduct the sale.

Q. Tell the Court and jury what you know in reference to the 85
deed, alleged deed, made by the Commissioners of the Sinking Fund to Alexander, in reference to its execution and delivery?

Objected to as too general.

Objection overruled.

A. At the sale the land sold; Mr. Duncan bid, but Mr. Lyles bid over, and he told me he did it as attorney; and when the deed was to be made, the Attorney-General was not present, and I requested the Assistant Attorney-General, Mr. Townsend, to 86
see that the deed was properly prepared. The deed was then prepared, without the name. Mr. Lyles still did not give the name of the purchaser; we had it put down to him as attorney. When the Board of the Commissioners of the Sinking Fund met I explained to them the transaction, and turned over to them the deed, without the name, and explained what had been done. Then it was in their possession: *they* discussed the matter, and signed the deed, and left it upon the table, and I said to Mr. Means, "You must lock that deed in the safe, consideration has not been paid," and he did so. 87

Q. What became of the deed? A. It was locked up in the safe in my office. About a week after that, I would not be positive as to the time, Mr. Lyles came into the office with the mortgage: it was dated North Carolina, and I declined to receive that until we saw Mr. Townsend, and he said it did make a difference about the way the mortgage was drawn, and therefore the paper had to be returned or prepared over. Mr. Lyles came in again some time after that, or even that day, perhaps, while we were discussing the matter of the mortgage, which had to be referred to Mr. Townsend; the deed had been brought out there by Mr. 88
Means, and placed back in the safe, after the mortgage had to be sent back. When Mr. Lyles returned the second mortgage, in accordance with the law, as Mr. Townsend required, I was away from the city, and do not know what transpired afterwards.

Q. To your knowledge did the Commissioners of the Sinking Fund ever have that *deed* in their possession after they laid it on the table at that meeting? A. Not that I know of. I have two safes in my office, one for the papers and money of the Sinking Fund and the other for the Secretary of State's papers: this was locked up in the safe of the Commissioners of the Sinking Fund,

89 and so far as I know it remained there until it was taken out of there when I was away from Columbia.

Q. You know nothing further in reference to that deed? A. After that I know nothing of my personal knowledge.

Q. Did you authorize, before you left home, any disposition of that deed. A. No.

Q. Did any member of the Fund, to your knowledge, authorize any disposition of it? A. No.

Q. Who appointed the day and the terms upon which the property should be sold; in other words, who acted in all this 90 matter in carrying out the authority of the Sinking Fund, if any authority had been given? A. As I stated, at the informal meeting they authorized me to sell the property, and I calculated the time it had to be advertised and appointed the day accordingly.

Q. You were there present at the sale? A. Yes.

Q. Who directed the sale itself? A. Mr. Means.

Q. As auctioneer? A. No, the auctioneer was Mr. Levin.

Q. You say you were authorized to make the sale and you appointed the day upon which the sale should be made; had the 91 advertisement been put in the paper? In what way was that authority given to you, in writing or verbally? A. It was just agreed at this meeting of the board.

Q. Any resolution of the board about it? A. No formal resolution.

Q. Did you ever authorize the insertion of the name of the purchaser of that land in that deed? A. I don't recollect that I distinctly authorized it, though it was understood that when Mr. Lyles had brought in the name there would be no objection.

Q. Did you or any of the Commissioners of the Sinking Fund, 92 to your knowledge, authorize Mr. Means to insert the name in the deed? A. When Mr. Lyles came in there to have the name inserted in the mortgage, he and I got to discussing the matter of the mortgage, and I don't remember that I authorized Mr. Means to insert it, though I may have assented to it without recollecting it distinctly.

Q. That objection was not made to that mortgage, that was the first mortgage that had to be sent on to North Carolina? A. That is my recollection: but those things are a little indistinct; but when the deed was signed it was signed without the name,

and about a week after that Mr. Lyles came in with the mort- 93
gage and brought the man.

Q. Do you know whether you were present when the name was inserted? A. I can't say definitely about that; I think it was done that same day.

Q. Did you see Mr. Means insert the name? A. No. I can only say when I suppose it was done, while Mr. Lyles and I were discussing the mortgage.

Q. It is in evidence that a demand was made upon you for the Agricultural Hall property, where was that demand made, if such a demand was made? A. I think Mr. Lyles came one day 94
into my office and very pleasantly said, you know I have come round to demand the Agricultural Hall, and he presumed that I would not give it up, to which I assented.

Q. Why did you refuse possession of the hall upon the demand? A. For the reason that the hall—these papers had been exchanged when I was absent, and when I came back I found the Governor had interfered and refused to deliver the hall, and it was still in my custody, and that custody had never changed, and it was a question whether Mr. Lyles had any right to it, and I did not give it up on that account as I still had the charge of 95
the building, and I did not believe he had the right under the circumstances.

Cross-Examination by Mr. Lyles.

Q. You have testified, in reference to the placing of that deed in the safe, you gave instructions to Mr. Means, when the cash portion of the purchase money was paid and the bond and mortgage delivered, to deliver the deed in your absence? A. No.

Q. It was his duty to do so under your general instructions? A. No.

Q. You have testified of the proceedings of the Commissioners 96
of the Sinking Fund at the time when they met February 2, 1892? A. That was the day of the sale, they met previous to that.

Q. Yes, but I am asking you now, they met on the 2d February, 1892, when they signed the deed? A. Yes.

Q. I have here what purports to be an extract of the minutes of the proceedings of the meeting, certified to by yourself as correct?

Objected to. Objection overruled.

From page 198 of the volume of the minutes of the Sinking
97 Fund.

Objected to.

Q. Look over that, and see whether that is right?

By the Court: Q. You must answer this question from your own memory. A. I would not undertake to do that; when we give certified statements, the only thing I could testify would be this, I believe if my name is signed to any certificate from the records of my office I verify them at the time; I would not attempt to swear to that from memory. I would not attempt to swear to anything that might be in the office from memory; but
98 if I give you a certificate from my office that such and such things are there, I always do that upon verification.

Q. What instructions were given to you by the Board, after it was signed, and after it was placed in your possession? A. It was understood that when this deed was proven it was to be delivered, but at that time there was no special resolution of instruction given, because the thing was incomplete.

Q. Was not this deed delivered by the Board to the Hon. J. E. Tindal (indicating)? A. That was understood; no formal resolution to that effect. I think the Secretary, in writing off
99 that, says what he presumes to be the action of the Board; that is my recollection; but there was no formal action of the Board taken.

By the Court: Q. Do you know anything about the payment of the cash portion of this purchase money? A. No.

Q. You never had it in your possession? A. No.

TESTIMONY.

100 DR. W. T. C. BATES, sworn:

Direct Examination by Mr. Melton.

Q. You are State Treasurer of South Carolina? A. Yes.

Q. Have you any office in the Sinking Fund Commission? A. Yes, as I understand, in the Act of 1883, I am the Treasurer of the Sinking Fund, also a member of the Sinking Fund, and also, by election, the Treasurer of the Sinking Fund.

Q. When were the original meetings of the Board held? A. Second Tuesday in each month.

Q. How were those meetings called? A. I will state that Mr. Means acted as clerk for me:

101

Q. By whose appointment? A. By my own appointment, with the consent of the Commissioners. It is his custom to send out for me the notices to the members in the week or ten days before the meeting.

Q. No direction is needed for the regular meeting? A. No.

Q. For any special meeting, who would direct the call? A. The Governor, who, as Chairman of the Board, has power to call any special meeting.

Q. Who are the members of the Board? A. The Governor of the State, *ex officio* Chairman, the Attorney-General and Comptroller-General and the Chairmen of the Ways and Means Committee of the Senate and the House.

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Q. Do you remember the names of those not regular officers of the State? A. I think D. E. Finley, of New York, was the Chairman of the Ways and Means Committee, W. D. Evans the Chairman of the Finance Committee of the Senate.

Q. Were you present at the sale? A. No.

Q. Did you go to the meeting when the deed was signed? A. No. I was not in the city of Columbia when that meeting was held. I did not sign the deed.

103

Q. Are you a member of the Commission of the Sinking Fund? A. Yes, but not having been present at the meeting when the deed was signed, I did not sign it.

Q. Tell the Court and jury what connection you had with the sale of that property, or with the delivery of the deed, or the alleged delivery? A. I remember that some time in January, I can't remember the day, Mr. Tindal, I think, came to the Treasurer's office and asked those of us members of the Board present to meet at the Governor's office to take some steps to bring about the sale of the Agricultural Hall. My recollection is that the Governor, myself, the Attorney-General and the Comptroller-General were present. The sale had been delayed. The Act requiring it to be sold was passed, I think, in 1890, and I think this was January, 1892, and we agreed to have the property advertised and sold on the first Monday in February, and we verbally gave Mr. Tindal, as Agent of the Sinking Fund, he had authority from the four of us to sell it.

104

Q. Were there any specific directions to Mr. Tindal? A. I don't know that there were.

105 Q. Did you dictate any of the terms of sale at all? A. I don't remember any formal directions being passed; usually, when we have those meetings, Mr. Means, who does the clerical work, is present, but he was not present. I don't believe there was any specific direction in the nature of an agreement that the sale should take place.

Q. Mr. Lyles has testified calling on you as State Treasurer; I wish you would tell the jury what occurred after the sale, when we called on you? A. As well as I recollect, and I think my memory is correct and clear, about the 16th of February I
106 was in the State Treasurer's office, and Mr. Wm. H. Lyles and Mr. Jacob Muller came into the Treasurer's office with Mr. Means, and Mr. Means had in his hands a paper which proved to be the papers alluding to this sale, the bond and mortgage and the title, as well as I remember; I suppose the same title which was produced here in Court; and Mr. Lyles wanted me to accept the payment of the cash portion of the purchase and pass the papers, and never having been called upon to do anything of that kind before, though I have been a member of the Sinking Fund Commission since 1890, I objected as not having been
107 present at the meeting of the Board when the title was prepared, and objected also on account of the absence of the Secretary of State and Attorney-General; neither of them were present in the city at the time. My attention was called to the fact that under the law the bond and mortgage securing the credit portion of the purchase was made payable to the State Treasurer. I thought very probably I might act in the matter; Mr. Lyles seemed very anxious I should do so. I hesitated, and mentioned again the absence of the Attorney-General, whose duty it was to state to the Board, or some member of the Board, that these
108 papers were all correct and regular. Mr. Means, I think, told me that some alterations had been made in the papers, and he thought them all right. Not suspecting any trick, I accepted the check from Mr. Lyles, and he insisted and got me to do what I never had done before, to issue an official receipt. Usually the money that comes into my hands as Treasurer of the Sinking Fund comes through the Agent of the Sinking Fund, and I receipt to him and deposit it to the credit of the regular account, the credit of the Sinking Fund. I don't remember, after my objections were overcome, I looked to Mr. Lyles and Mr. Muller; I had confidence in them and believed the transaction was

straight. I accepted the check and gave him my receipt, and I 109
have the check in my pocket. I don't remember a formal delivery of the deed. I remember the proceeding was rather informal. I remember we handled the papers, first one, then another. I was aware of the fact that Mr. Lyles had the deed. I don't remember *formally* handing him the deed.

Q. Was that check ever cashed or even taken to the bank? A. No.

Q. You never received the money on that check? A. No.

Q. Was there any attempt at that time to pay the cash portion in any other way except by cash? A. Yes. 110.

Q. What was done in reference to it? A. The cash portion under the Act could all be paid in cash; he offered to pay me one-third cash provided for in the sale in the form of a certified check, which I agreed to take.

Q. Had the Commissioners of the Sinking Fund ever given you authority to collect money either as member of the Board or as trustee for the sale of this Agricultural Hall? A. No

Q. You never had authority to collect money for them? A. I always felt, by the authority of my office, that I was responsible for the money that came into my hands; usually it is collected 111
by the Agent of the Sinking Fund and turned over to me and I give the receipt.

Q. Had Mr. Tindal ever authorized you to collect the money for the Sinking Fund? A. No.

Q. Did you present the check at all? A. No.

Q. Was any other tender made to you at that time for the cash portion? A. I can't say; the tender of the one-third was made to me in the form of a certified check; I understand Mr. Melton to ask if that one-third was tendered in any other form that was entirely acceptable to me; I did not demand the ac- 112
tual money.

Judge Simonton rules that when the cash portion was tendered in this form, and the bond and mortgage were given, and the deed was delivered, that that terminated that transaction, and that nothing that occurred subsequent to that action can be brought into evidence here, as we are discussing the validity of this sale.

Q. I understood you to say that you made no formal delivery of that deed? A. Not that I remember.

Q. Were you ever authorized to make any delivery of that deed? A. No.

113 Q. Was it ever placed in your hands in escrow or any other way? A. No, except as I stated, it was brought to me by Mr. Means, accompanied by Mr. Lyles and Mr. Muller.

Cross-Examined by Mr. Lyles.

Q. That check you have testified to was certified by Captain Willie Jones, Cashier of the Columbia National Bank? A. Yes.

Q. That is a perfectly solvent bank? A. Yes.

Q. And is your State depository? A. One of them.

Q. The check calls for the payment of how much? A. That
114 was the amount of the cash portion of the purchase money.

Q. That is the amount as is mentioned in your receipt given? A. It is.

IN REPLY.

Q. Do you know of your own knowledge if the amount mentioned in this receipt was the cash portion for which the property sold, or do you know from what somebody told you? A. I only compared the check with the papers brought to me; I was not officially informed except by the parties who brought all the
115 papers to me.

TRIAL OF CAUSE.

At a stated term of the Circuit Court began and holden at Charleston, S. C., in the District aforesaid, on the 4th day of April, 1894, this case came up for trial before the following jury, which was selected, organized and sworn, to wit: J. M. Prioleau, Foreman, Phillip Riley, Israel Ottalengui, Warren D. Hamlin,
116 Perry Halfacre, J. M. Elliott, Charles Trenholm, Jessie Truesdale, C. W. Caldwell, Cleland Williman, J. L. Courtney and J. B. Larrisey. The pleadings were read to the Court and jury, and the testimony taken by consent of counsel was also read. The following witness was sworn and examined on behalf of the plaintiff, to wit: W. H. Lyles.

The defendants made a motion for a non-suit. After hearing arguments of counsel, the Court refused to grant a non-suit. The following witnesses were sworn and examined on behalf of the defendants, to wit: J. E. Tindal, Secretary of State; W. T.

C. Bates, State Treasurer; James G. Gibbes and David H. 117
Means. Arguments were made by Mr. Muller on behalf of plaintiff, and by Mr. Buchanan, Attorney-General, and Mr. L. D. Melton on behalf of defendants, and by Mr. Lyles and Mr. Muller in reply on behalf of plaintiff.

The Court charged the jury and they retired and considered the case and returned into Court with the following verdict:

"We find for the plaintiff the possession of the land in dispute as described in the complaint.

J. M. PRIOLEAU,

April 7th, 1894. Foreman." 118

JUDGMENT.

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.

EDWARD B. WESLEY, *Plaintiff*,

vs. 119

J. E. TINDAL AND J. R. BOYLES, *Defendants*.

This action having been brought to a trial at a Circuit Court held on the 4th day of April, A. D. 1894, before Judge Charles H. Simonton and a jury, and a verdict for Edward B. Wesley, the plaintiff, against J. E. Tindal and J. R. Boyles, the defendants, having been rendered therein by the jury on the 7th day of April, 1894, for the possession of the real estate in dispute, and described in the complaint therein as follows, to wit: All that lot, piece or parcel of land, situate in the city of Co- 120
lumbia, County of Richland, and State of South Carolina, containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the North by land now or late of the estate of McAndrews; on the East by Richardson street, and on the South and West by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, Sheriff of Richland County, by deed dated 3d day of May, 1875, and recorded in Book K of Deeds, pp. 106 and 107. Also all

that certain parcel or lot of land situate, lying and being in city
121 of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded North by the "Agricultural Hall," building and lot immediately in rear thereof; East by Richardson street; South by lot now or formerly of Jacob C. Lyons; and West by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker; said lot being a rectangular paraellelogram in shape, and measuring on Richardson street from the Southeastern corner of the said Parker Block building South twenty-six feet, and from East to West two hundred and eight feet; the said lot also joining a part of the Agricultural Hall Block, and being the
122 same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1875, and recorded in R. M. Conveyance Office for Richland County, in Book K of Deeds, pp. 319 and 320; the above described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston, dated April 9th, 1883, and recorded in R. M. Conveyance Office in Book P of Deeds, &c., p. 87; and the costs having been adjudged at fifty-three and 35-100 dollars.

Now, on motion of Messrs Lyles & Muller, attorneys for said
123 Edward B. Wesley, plaintiff, it is adjudged:

That Edward B. Wesley, plaintiff, do recover of the defendants, J. E. Tindal and J. R. Boyles, the possession of the real property described in the complaint herein.

And, further, that he recover of the said defendants the sum of fifty-three and 35-100 dollars, costs of this action.

LYLES & MULLER,
Plaintiff's Attorneys.

Signed, sealed and entered this 7th day of May, 1894.

124 [SEAL.]

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

Filed May 7th, 1894, at 12 o'clock M.

EXECUTION.

125

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
FOURTH CIRCUIT,
IN THE CIRCUIT COURT.

EDWARD B. WESLEY, *Plaintiff.*
vs.
J. E. TINDAL AND J. R. BOYLES, *Defendants.*

To John P. Hunter, Esq., United States Marshal, or his lawful deputies—Greeting: 126

Whereas, judgment was rendered on the ——— day of May, one thousand eight hundred and ninety-four, for an action in the Circuit Court of the United States for the District of South Carolina, between Edward B. Wesley, plaintiff, and J. E. Tindal and J. R. Boyles, defendants, in favor of said Edward B. Wesley, plaintiff, against the said J. E. Tindal and J. R. Boyles, defendants, for the recovery of the possession of the following described real estate, to wit: All that lot, piece or parcel of land situate in the city of Columbia, County of Richland, and State of South Carolina, containing one-quarter 127
of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the North by land now or late of the estate of McAndrews; on the East by Richardson street; and on the South and West by lands now or formerly of Jacob C. Lyons; said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, Sheriff of Richland County, by deed dated 3d day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 106 and 107; also all that certain parcel or lot of land situate, lying and being in the city of 128
Columbia, and State aforesaid, containing about one-eighth of an acre of land, bounded North by the "Agricultural Hall" building and lot immediately in rear thereof; East by Richardson street; South by lot now or formerly of Jacob C. Lyons; and West by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker; said lot being a rectangular parallelogram in shape, and measuring on Richardson street, from the Southeastern corner of the said Parker Block building, South, twenty-six feet, and from East to West two hundred and eight feet; the said lot also adjoining *a part* of the "Agricultural Hall" Block,

129 and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1876, and recorded in R. M. Conveyance Office for Richland County in Book K of Deeds, pp. 319 and 320; the above described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston dated April 9th, 1883, and recorded in R. M. Conveyance Office in Book P of Deeds, etc., p. 87; and also for the sum of fifty-three and 35-100 dollars costs and charges therein, as appears to us by the judgment roll filed in the office of the Clerk of said
130 Court:

And whereas the sum of fifty-three and 35-100 dollars costs and charges as aforesaid are now actually due thereon:

Therefore, we command you that you deliver the property to the said Edward B. Wesley, plaintiff, and that you satisfy the said sum of fifty-three and 35-100 dollars costs and charges aforesaid out of the personal property of the said judgment debtor within your District belonging to the said judgment debtors on the day when the said judgment was so docketed in your District, or at any time thereafter, in whose hands soever
131 the same may be, and duly return this execution, according to law, to the Clerk of the said Court, at Charleston, S. C.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., the 7th day of May, one thousand eight hundred and ninety-four.

LYLES & MULLER,
Plaintiff's Attorneys.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

John P. Hunter, U. S. Marshal for said District, levy and
132 collect $53.35, with interest, from the 7th day of May, 1894, besides your fees, etc.

LYLES & MULLER,
Attorneys for Judgment Creditors.

Attorney	$20 00
Clerk Hagood	20 35
Marshal Cunningham	13 00
	$53 35

Entered in Execution Docket, fol. 92, this 7th May, 1894.

J. P. HUNTER,
U. S. Marshal.

Filed 7th May, 1894.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

133

UNITED STATES OF AMERICA.
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT.
FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF NEW YORK,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA.

134

The attorney for the defendants having given notice of exceptions to the rulings of the Trial Judge, on the admission of testimony in the cause, on the motion for a non-suit and on the plea to the jurisdiction of the Court,

Ordered, That they have until the first day of August, 1894, to make and file their bill of exceptions with the Clerk of this Court.

CHARLES H. SIMONTON,
Circuit Judge.

MAY 2, 1894.

Filed 2d May, 1894.

135

BILL OF EXCEPTIONS.

THE UNITED STATES OF AMERICA.
DISTRICT OF SOUTH CAROLINA.
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK,
Plaintiff,

vs.

J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*. 136

On Appeal to the United States Circuit Court of Appeals, sitting at Richmond, Virginia, for the Fourth Circuit.

DEFENDANTS' BILL OF EXCEPTIONS.

FIRST.

Be it remembered, that during the progress of the trial the Court excluded the following testimony of W. H. Lyles, a witness examined on behalf of the plaintiff, while under cross-exam-

137 ination by the attorneys for the defendants, on the ground that the said testimony was incompetent and irrelevant.

The testimony thus excluded is as follows:

Q. You and Mr. Muller went out of the State Treasurer's office and almost immediately returned, now what occurred between the State Treasurer on the one hand and Mr. Muller and yourself on the other? A. We returned within five minutes—I think within two minutes. We called the State Treasurer's attention to the fact that the bond, which had been delivered by
138 us for Alexander, contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script, known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing.

139 Q. And it was refused? A. Yes, the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in the United States Court, in order to test the validity of the revenue bond script, was not that the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script, but as to the United States Circuit Court we were not—

Q. Then when you bought it you did not intend to pay for it in good money? A. We did, and considered the script as good money.

140 Q. When you made the purchase you made it with a view of compelling the State to take the deferred payment of it in revenue bond script? A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market? A. I don't know.

Q. It has not? A. I don't know that it has.

Q. Very little, if any? A. Yes.

Q. You know Alexander? A. Yes; I have never seen him personally.

Q. Do you know him as a poor man? A. Yes.

Q. He and Mr. Wesley had no use for this property that you 141
know of except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond script? A. Yes.

To this ruling the defendants, by counsel, excepted and offered this their first bill of exceptions, and prayed that it be signed, sealed and made a part of the record, which is accordingly done. 142

CHARLES H. SIMONTON, [L. S.]
Circuit Judge.

SECOND.

Be it remembered that at the close of the testimony in this case the defendands entered a motion to dismiss the complaint on the plea to the jurisdiction of the Court contained in the second defense set up in the answers of the defendants herein and on the evidence introduced to sustain the plea. The defendants contended that they were mere custodians and caretakers of 143
the premises, not in possession or having any interest therein, and were not proper parties to the suit, and that this cause was in effect a suit against the State of South Carolina. The Court overruled the motion to dismiss the complaint, and held that this cause was not in effect a suit against the State of South Carolina, and that the defendants were proper parties, and that the Court had jurisdiction.

Thereupon, the defendants, by their counsel, at the time excepted to the ruling of the Court, and tendered this their second bill of exceptions, which they prayed may be signed, 144
sealed and made a part of the record, which is accordingly done.

CHARLES H. SIMONTON, [L. S.]
Circuit Judge.

Filed 24th July, 1894.

145 **ASSIGNMENT OF ERRORS AND PETITION FOR WRIT OF ERROR.**

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.

EDWARD B. WESLEY, A CITIZEN OF THE STATE OF NEW YORK, *Plaintiff*,

vs.

146 J. E. TINDAL AND J. R. BOYLES, CITIZENS OF THE STATE OF SOUTH CAROLINA, *Defendants*.

To the Honorable Circuit Court of the United States for the District of South Carolina:

The defendants above named, by counsel, respectfully assign the following errors to the judgment rendered in this cause, and to the rulings of the presiding Judge during the progress of the trial:

I.

147 That the Court erred in excluding the testimony of W. H. Lyles, a witness examined on behalf of the plaintiff, while under cross-examination by the attorneys for the defendants, which said testimony is as follows:

Q. You and Mr. Muller went out of the State Treasurer's office and almost immediately returned; now, what occurred between the State Treasurer on the one hand and Mr. Muller and yourself on the other? A. We returned within five minutes; I think within two minutes. We called the State Treasurer's attention to the fact that the bond which had been delivered by
148 us for Alexander contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt; we demanded nothing.

Q. And it was refused? A. Yes; the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue 149
in the United States Circuit Court, in order to test the validity of the revenue bond script; was that not the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script; but as to the United States Circuit Court, we were not * * *

Q. Then when you bought it you did not intend to pay for it in good money? A. We did, and considered the script as good money.

Q. When you made the purchase you made it with a view of compelling the State to take the deferred payment of it in 150
revenue bond script? A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market? A. I don't know.

Q. It has not? A. I don't know that it has

Q. Very little, if any? A. Yes.

Q. You know Alexander? A. Yes; I have never seen him personally.

Q. Do you know him as a poor man? A. Yes.

Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred? 151
A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond script? A. Yes.

II.

At the close of the testimony introduced by the plaintiff the defendants entered a motion for a non-suit, on the grounds that no evidence was introduced by the plaintiff showing or tending 152
to show in the plaintiff title by grant from the State, or such possession either in plaintiff or his predecessors or grantors as would warrant the presumption of a grant from the State; and no evidence showing or tending to show a source of title common to both plaintiff and defendants.

And these defendants assign error in the presiding Judge in overruling this motion for a nonsuit.

153 III.

In his answer to the complaint in this action the defendant, J. E. Tindal, entered a plea to the jurisdiction of the Court as follows:

FOR A SECOND DEFENSE.

First. Further answering, this defendant, for a second defense, says: That on the 20th day of February, A. D. 1892, designated in the said complaint, this defendant was, and has since continued to be and now is, the Secretary of State of the
154 said State of South Carolina; that the premises described in the said complaint on the said day were, and have since continued to be and now are, the property and in the possession of the said State and in actual public use.

Second. That the defendant has no right, title, interest or estate to or in the said premises of any kind whatever, but that, in pursuance of law, the same is in the custody of this defendant as said Secretary of State.

That in his answer to the complaint in this action the defendant, J. R. Boyles, entered a plea to the jurisdiction of the Court
155 as follows:

FOR A SECOND DEFENSE.

First. Further answering, this defendant, for a second defense, says: That on the 20th day of February, A. D. 1892, designated in the said complaint, J. E. Tindal, co-defendant herein, was, and has since continued to be and now is, the Secretary of the said State of South Carolina.

Second. That the said premises are the property of the State of South Carolina, and on the said day and since have been and
156 now are in the possession of the said State and in actual public use.

Third. That this defendant has no right, title, interest or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal, as Secretary of State, this defendant has been and now is engaged on behalf of the said State in watching, guarding and taking care of the said premises.

The uncontradicted testimony is to the effect that the said J. E. Tindal is now and was at the times mentioned in the complaint the Secretary of State of the State of South Carolina.

That he had charge and custody of the said premises by virtue 157
of his office as Secretary of State, who is under the laws of the said State the custodian of all public buildings belonging to the said State situated in the city of Columbia. That he employed the defendant, J. R. Boyles, as watchman, to guard the property and protect the building here in dispute; that neither of them had any interest in the property, derived no income therefrom and did not live thereon. That the said defendants had and claimed to have no right, title, interest or estate of any kind whatever in or to the said premises. That the said premises were not in their possession, but on the contrary the greater por- 158
tion thereof was in the possession of the State in use for public purposes, a small portion thereof being occupied by tenants of the State of South Carolina.

After the evidence was closed, these defendants entered a motion to dismiss the complaint on the said plea and the facts of the case as hereinbefore stated, on the ground that the defendants were mere custodians and caretakers of the said premises, not in possession or having any interest therein, and that this action was in effect a suit against the State of South Carolina.

The Court overruled the motion to dismiss, and these defend- 159
ants assign error in the Court in so doing.

Wherefore, for these and other errors apparent in the rendition of said judgment, and in the rulings of the Court, these defendants, by counsel, pray a writ of error and supersedeas to said judgment, that the same may be allowed, and that a transcript of this record and proceedings, and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals for the Fourth Circuit, sitting at Richmond, Va.

And your petitioners will ever pray, etc., etc.

J. E. TINDAL, 160
J. R. BOYLES,
By their Counsel, Melton & Melton.

Filed 9th July, 1894.

SUPERSEDEAS BOND.

Know all men by these presents, That we, J. E. Tindal, J. R. Boyles, as principal, and B. R. Tillman and W. D. Mayfield, as sureties, are held and firmly bound unto Edward B. Wesley in the full and just sum of four thousand dollars, to be paid to the

said Edward B. Wesley, his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of July, in the year of our Lord one thousand eighty hundred and ninety-four.

Whereas, lately at a Circuit Court of the United States for the District of South Carolina, in a suit depending in said Court between the said Edward B. Wesley, plaintiff, and the said J. E. Tindal and J. R. Boyles, a judgment was rendered against the said J. E. Tindal and J. R. Boyles, and the said J. E. Tindal and J. R. Boyles having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward B. Wesley, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such that if the said J. E. Tindal and J. R. Boyles shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

J. E. TINDAL, [SEAL.]
B. R. TILLMAN, [SEAL.]
J. R. BOYLES, [SEAL.]
W. D. MAYFIELD, [SEAL.]

Sealed and delivered in presence of
D. H. MEANS,
F. M. MIXSON.

Approved:

CHARLES H. SIMONTON,
Circuit Court.

JULY 3, 1894.
Filed 9th July, 1894.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *SS:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the District of South Carolina—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Edward B. Wesley, a citizen of the State of New York, plaintiff, against J. E. Tindal and J. R. Boyles, citizens of the State of South Carolina, defendants, a manifest error hath happened, to the great damage of the said defendants, J. E. Tindal and J. R. Boyles, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond on the 2d day of August next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

165 166 167

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 3d day of July, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL OF THE COURT.]

J. E. HAGOOD,

168

Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by

CHARLES H. SIMONTON,
Circuit Judge.

Filed 9th July, 1894.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

BRIEF OF ARGUMENT IN REPLY FOR MOTION TO DISMISS AND TO AFFIRM.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, 15,680.

ROBERT W. SHAND, COLUMBIA, S. C.,

Counsel for Defendants in Error as to these Motions.

BRIEF OF ARGUMENT IN REPLY FOR MOTION TO DISMISS AND TO AFFIRM.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 796.

THE STATE OF SOUTH CAROLINA, PLAINTIFF IN ERROR,

vs.

EDWARD B. WESLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, 13,680.

ROBERT W. SHAND, COLUMBIA, S. C.,

Counsel for Plaintiff in Error as to these Motions.

I.

Counsel for plaintiff in error, with reference to the second ground taken for the motion to dismiss, makes the point that in the agreement of counsel appearing in the printed transcript of record, at page 18; that it was stated that exception was duly taken and noted. An examination of the record will demonstrate, however, that the exception there referred to was to the oral refusal by the Circuit Judge of the motion to dismiss the complaint. The point we make is, that the error assigned was to the order of the Circuit Judge found in the transcript which was made nine days after the trial of the cause had ended and that no exception is shown in the transcript to any order.

II.

The defendant in error objects to the consideration by this Court of that part of the brief of Samuel W. Melton, Esq., Counsel for plaintiff in error, as to these motions, which sets out the transcript of record in the case of J. E. Tindal and J. R. Boyles, plaintiffs in error, vs. Edward B. Wesley, defendant in error, which is now pending in the Circuit Court of Appeals for the Fourth Circuit. This Court will not settle the merits of this motion by reference to a transcript of record in a case between different parties and in a different court.

Robert W. Shand.